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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED PAPERWORKERS INTERNATIONAL UNION, and
UNITED PAPERWORKERS LOCAL UNION NO. 1033,
Petitioners,

v.

ROLAND BUZENIUS
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 8(a)(3) of the National Labor Relations Act provides that "nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . ." In applying this provision, the National Labor Relations Board has prescribed a model union security clause requiring that all covered employees "become and remain members in good standing in the Union" as being in "compliance with the congressional policy as reflected in the union-shop proviso of Section 8(a)(3) of the Act." Given the terms of the Act and the NLRB's model clause, the most common form of union security agreement is a union shop clause requiring employees to be "members" or "members in good standing" of the union. The question raised by a conflict among five circuits is:

> Whether standard-form union shop clauses are facially valid on the grounds that the clause is in conformity with the applicable statute and capable of lawful application and enforcement, or whether such clauses are facially invalid on the grounds that the clauses are to be judged as a form of notice to the covered employees and must therefore spell out the full legal definition of the term "membership," which under the NLRA is a "term of art."

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

United Paperworkers International Union ("UPIU") and UPIU Local Union No. 1033 petition for a writ of *certiorari* to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit in *Buzenius v. NLRB*, 6th Cir. No. 96-5139.

OPINIONS BELOW

The decision of the court of appeals is reported at 124 F.3d 788 and is reproduced in the appendix to this petition ("Pet. App.") at pp. 1a-13a, *infra.* The decision and order of the National Labor Relations Board is reported at 320 NLRB 349 and is reproduced at Pet. App. 14a-35a, *infra.*

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), provides:

> It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (3) by discriminaiton in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employee from making an agreement with a labor organization (not established, maintained, assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the

> employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employees to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

STATEMENT

Roland Buzenius has been employed by the Weyerhaeuser Corporation for over fifteen years in a bargaining unit represented by the United Paperworkers International Union (UPIU) and UPIU Local Union No. 1033 and was a member of the Paperworkers Union until 1993. Pet. App. 24a. From 1990 to the start of 1992, Mr. Buzenius was President of Local 1033. *Id.*

The collective bargaining agreement between Weyerhaeuser and the Paperworkers contains the following union shop clause:

> It is agreed that all employees who are members of the Union shall remain members of the Union in good standing. All new employees, who after completion of thirty (30) days shall become and remain members of the Union in good standing as a condition of employment. [Pet. App. 24a.]

Mr. Buzenius was President of Local 1033 during the negotiation of the 1990-1994 agreement that included this clause, and he understood that the clause did not require covered employees to become full union members and that nonmember employees could object to the payment of full union dues under the clause. Pet. App. 25a. He, in fact, explained these limitations on the clause's scope and effect to fellow employees on a number of occasions, both during and after his tenure as Local President. *Id.* at 25a-26a.

On April 30, 1993, Mr. Buzenius wrote letters to the International Union and to the Local Union resigning

from membership and requesting that the payments required of him under the union shop clause be reduced to reflect the Unions' expenditures on "collective bargaining" activities. Pet. App. 24a-25a. Then, on June 23, 1993, since the Unions had not responded to these letters by deleting Mr. Buzenius's name from their membership rolls and reducing the amount of the authorized deductions taken out of his pay as union dues, Mr. Buzenius filed unfair labor practice charges against the Unions. *Id.* at 23a.

Acting on these charges, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Unions had committed unfair labor practices in violation of National Labor Relations Act § 8(b)(1)(A) by failing to acknowledge Mr. Buzenius's resignation from membership and by failing to inform him and other employees of their rights to refrain from full union membership and to object to paying the costs of noncollective bargaining union activities. Pet. App. 23a. The Board found merit to these allegations and ordered the Unions to honor Mr. Buzenius's resignation from membership, to refund excess deductions from his pay and reduce future deductions, and to notify all employees covered by the union shop clause of their rights to refrain from full union membership and to object to the payment of full union dues. *Id.* at 21a-22a.

The Unions have complied with the Board's order. Mr. Buzenius, on the other hand, petitioned for review of the NLRB's decision in the U.S. Court of Appeals for the Sixth Circuit in order to challenge the Board's refusal to expunge the union shop clause from the collective bargaining agreement. The Sixth Circuit reversed the Board's decision on the ground that "the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." Pet. App. 12a-13a.

REASONS FOR GRANTING THE WRIT

National Labor Relations Act § 8(a)(3) and its provisos—enacted as part of the Taft-Hartley amendments to the Wagner Act—are the product of Congress' "most mature deliberation . . . [over] the problem posed by compulsory union membership," a pivotal and "controversial issue" in formulating the national labor policy both then and now. S. Rep. No. 105 on S.1126, 80th Cong., 1st Sess., 5 (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act of 1947*, 411 (1948) ("LMRA Leg. Hist.").

In "reaching what it consider[ed] a solution of the problem," Congress sought to "do[] justice to both points of view." S. Rep. No. 105, *supra*, at 6. *See Machinists Local v. Labor Board*, 362 U.S. 411, 418 n.7 (1960). An integral part of this carefully balanced legislative "solution" is the express, unequivocal permission—provided in the interest of promoting industrial stability and of facilitating the collective bargaining process—to "enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired . . ." S. Rep. No. 105, *supra*, at 7.

And, over forty years ago, the National Labor Relations Board, in an attempt to further Congress' aim of facilitating collective bargaining, prescribed a model union shop clause—in the "member in good standing" form at issue here—"as being in compliance with the congressional policy as reflected in the union-shop proviso of Section 8(a)(3) of the Act." *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880, 884 (1958). *See id.* at 885 (prescribing a model clause).[1]

Some 80% of NLRA collective bargaining agreements —covering more than five million employees—contain

[1] In the union security context, being a "member in good standing" means tendering the required dues or fee payments in a timely manner. *See* Bureau of National Affairs, *Collective Bargaining: Negotiations and Contracts* 87:301 (1996).

union security provisions. U.S. Department of Labor, *Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions* 44-45 (May 1982). Given the terms of § 8(a)(3)'s first proviso, "by far the most prevalent form of security . . . [is the] union shop clause[] requir[ing] that all employees in the bargaining unit become members and maintain membership as a condition of employment." BNA, *Collective Bargaining: Negotiations and Contracts* 24:301 (1996). And, given the NLRB's *Keystone* decision, many of these union shop clauses are phrased in terms of "membership in good standing." *See, e.g., id.* at 87:62. The present state of affairs serves to realize Congress' purpose to stabilize industrial relations and to simplify collective bargaining by setting out in the Act the articulation for a standard-form union shop clause that "nothing in [the NLRA], or in any other statute of the United States, . . . preclude[s]. . . ."

Now, however, what Congress so carefully put together, a conflict in the circuits is tearing apart.

The Sixth Circuit in this case—citing and relying on an Eighth Circuit decision of recent vintage—has ruled that a standard-form union shop "membership in good standing" clause is *"facially invalid."*

Contemporaneously, the D.C. Circuit, the Seventh Circuit and the Ninth Circuit have held that such union shop clauses are *entirely valid.*

The National Labor Relation Board, pulled in two directions by opposite and irreconcilable appellate court rulings, has added to the legal disarray by announcing that the Board intends to reconsider the facial validity of these clauses and by moving for remand to the Board of three pending circuit court cases—with the result that one circuit has denied the Board's request and is proceeding on the merits, one has given the Board only a limited remand while retaining jurisdiction, and one has not yet acted on the Board's motion. *See* Motions of the NLRB for Re-

mand in *Orce v. NLRB*, 2d Cir. No. 97-4038, *Cecil v.* NLRB, 6th Cir. No. 97-5302, and *Bloom v. NLRB*, 8th Cir. No. 97-1582.[2]

Meanwhile, the thousands of employers and unions, who for the last 40 years have negotiated union shop clauses in precisely the form prescribed by the NLRB, are left in complete uncertainty as to the continued validity of their agreements. Indeed, since the Sixth, Seventh and Eighth Circuits abutt each other, many of these employers and unions are party to collective bargaining agreements that apply to locations in a circuit that has upheld the validity of the union shop clause and also apply to locations in a circuit that has held the clause facially invalid.

The ramifications of this conflict in the circuits, the importance of uniformity in the law governing collective bargaining agreements and the weight Congress put on assuring industrial peace and collective bargaining stability in crafting § 8(a)(3) and its provisos call for the grant of a writ of *certiorari* here.

1. In the instant case, the Sixth Circuit ruled that "a union-security clause requiring employees to become and remain 'members of the Union in good standing' as a condition of continued employment, without concurrent definition in the collective bargaining agreement, is facially invalid." Pet. App. 1a.

In so ruling, the Sixth Circuit relied upon the Eighth Circuit's decision in *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994). Pet. App. 8a-9a. In *Bloom*, the Eighth Circuit overturned a settlement agreement—that had been entered into by the NLRB General Counsel and approved

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[2] The Second Circuit denied the Board's motion for remand in *Orce*, and held oral argument in that case on November 20, 1997. The Eighth Circuit granted the Board ninety days in which to reconsidered its *Bloom* decision. The Board's motion in *Cecil* is pending in the Sixth Circuit.

by the NLRB—on the ground that the agreement did not "require[] expunction" of the "membership in good standing" union shop clause, even though the NLRB General Counsel's complaint in that case had alleged that the clause was "overly broad." 30 F.3d at 1005.

The court below expressly acknowledged that its decision in this case is in conflict with the recent decisions of the D.C. Circuit in *I.U.E. v. NLRB*, 41 F.3d 1532, 1538-39 (D.C. Cir. 1994), and of the Seventh Circuit in *Nielsen v. International Ass'n of Machinists*, 94 F.3d 1107, 1113-15 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1426 (1997). Pet. App. 7a-8a. As the opinion below correctly notes, in *I.U.E.*, "the District of Columbia Circuit upheld a union-security clause requiring all members of the bargaining unit to join and remain 'members of the Union in good standing as a term and condition of employment.'" Pet. App. 7a, quoting *I.U.E.*, 41 F.3d at 1532. And, as the opinion below also correctly notes, the Seventh Circuit in *Nielsen*, "agreed with the reasoning of the District of Columbia Circuit and concluded that [*Communication Workers v.*] *Beck*[, 487 U.S. 735 (1988),] does not call into question the facial validity of such clauses." Pet. App. 8a, citing *Nielsen*, 94 F.3d at 1115.

Lastly, to make the circuit conflict even deeper, in a decision issued 10 days before the Sixth Circuit's decision in this case, the Ninth Circuit, relying upon *I.U.E.* and *Nielsen*, held that a union does "not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing." *Marquez v. Screen Actors Guild*, 124 F.3d 1034, 1039 (9th Cir. 1997). *See id.* at 1037-39.

In sum, there is a conflict between the D.C., Seventh and Ninth Circuits, on the one hand, and the Sixth and Eighth Circuits, on the other, as to the validity of a union shop clause drafted in the form long prescribed by the NLRB as being in conformity with NLRA § 8(a)(3).

2. The decision below flies in the face of the plain language of NLRA § 8(a)(3), that provision's legislative history and this Court's decisions construing that statutory language.

The first proviso to § 8(a)(3) states unequivocally:

> Nothing in this Act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . . [29 U.S.C. § 158(a)(3).]

Thus, as this Court has observed, "agreements *requiring 'membership'* in a labor union . . . are *expressly permitted* by the [first] proviso" to § 8(a)(3)." *Retail Clerks v. Schermerhorn,* 373 U.S. 746, 751 (1963) (emphasis added). Or, as Judge O'Scannlain put it in *Marquez,* "The NLRA by its very terms allows the inclusion of a union security term requiring union 'membership.'" 124 F.3d at 1038.

At the same time, § 8(a)(3)'s "second proviso mandates that . . . union membership is 'whittled down to its financial core.'" *Gilbert v. NLRB,* 56 F.3d 1438, 1441 (D.C. Cir. 1995), *cert. denied,* 116 S.Ct. 1261 (1996), quoting *NLRB v. General Motors Corp.,* 373 U.C. 734, 742 (1963). The second proviso does so, however, *not* by modifying the permitted contract language set out in the first proviso, but by placing limits on the *enforcement* of the union shop clause recognized as lawful by the first proviso. In this regard, the second proviso states that:

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has rea-

> sonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. [29 U.S.C. § 158(a)(3).]

Read together and according to their plain meaning, then, § 8(a)(3)'s two provisos stand for the proposition that "an employer and a union may contract to require as a condition of employment that unit employees maintain 'membership' in the union, provided that membership is available to all and that it requires nothing more than 'tender[ing] the periodic dues and the initiation fees uniformly required.' 29 U.S.C. § 158(a)(3)." *Finerty v. NLRB*, 113 F.3d 1288, 1290 (D.C. Cir. 1997), *cert. denied*, No. 97-355 (Dec. 1, 1997). *See Radio Officers v. NLRB*, 347 U.S. 17, 40-41 (1954) ("§ 8(a)(3) . . . authorizes employers to enter into certain union security contracts" but "prevent[s] the utilization of union security agreements for any purpose other than to compel payment of union dues and fees"). To put this another way, as a result of the second proviso's limitations on enforcement of union security agreements, "the concept of 'membership' in CBAs has become a term of art. . . ." *Marquez*, 124 F.3d at 1038.

The decision to proceed in this way—to specify a lawful contract clause using a term of art and to place limits on its enforcement without requiring that those limits be spelled out in the clause—represents not mere inadvertence but a careful policy judgment. As Senator Taft explained, in so framing § 8(a)(3), Congress' intent was to create a regime that "will permit the continuation of existing relationships, and will not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will meet the abuses which exist." 2 LMRA Leg. Hist. at 1420.

3. While "recogniz[ing] that Congress, through § 8 (a)(3), has sanctioned union-security clauses requiring union 'membership' as a condition of employment," the court below believed itself free to disregard Congress' "sanction" because "the Supreme Court has glossed the statute in a way that virtually inverts the literal meaning," Pet. App. 11a-12a, and because "the Supreme Court has never explicitly delineated the permissible language of a § 8(a)(3) union-security clause," *id.* at 9a, thereby leaving it open to the courts of appeals to set a new standard for valid union security clauses. In particular, the court below noted that "[t]he *Beck* Court did not address the question of what language is permissible in a union-security clause." *Id.* at 6a.

a. The court below created this supposed void in the law by misreading this Court's decisions. It is clear from the opinion in *Communications Workers v. Beck, supra,* that the Court considered the question of the legality of standard-form union shop agreements to have been definitively answered in the affirmative. The *Beck* opinion repeatedly states that § 8(a)(3) "*permits* an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment. . . ." 487 U.S. at 745 (emphasis added; footnote omitted). *See also id.* at 749 ("§ 8(a)(3) allows employers to enter into agreements requiring all the employees in a given bargaining unit to become members"). *See Machinists v. Street,* 367 U.S. 740, 771 (1961) ("[T]he union-shop agreement itself is not unlawful."). *See also Ellis v. Railway Clerks,* 466 U.S. 435, 439 (1984) ("[Petitioners] do not contest the legality of the union shop as such, nor could they."). And, *Beck* does so because the validity of a standard-form union shop clause was a settled matter by *NLRB v. General Motors Corp., supra.*[3]

[3] *General Motors* considered "whether the agency shop is an unfair labor practice under § 8(a)(3) of the Act or else is exempted from the prohibitions of that section by the [first] proviso thereto." 373 U.S. at 736. The agency shop "places the option of membership

b. The Sixth Circuit's concern that § 8(a)(3) and its provisos sanction union shop clauses that "do violence to the Act's policy of voluntary unionism" and that improperly require employees to "consult extraneous sources and subsequent notices in order to discover that they have a right not to do what the plain language of the clause requires," Pet. App. 11a, teaches once again why the making of the national labor policy is committed to the Legislative Branch.

The court below proceeded on the understanding that employees covered by a union shop clause, in making union association decisions, are put in isolation and required to scour the collective bargaining agreement and its union shop clause, to interpret its meaning. The truth of the matter is that the employee's decision to join a union or to be a nonmember fee payer is, in the run of cases, made not in isolated study of a collective bargain-

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in the employee while still requiring the same monetary support as does the union shop." *Id.* at 744. And, "rel[ying] upon the express words of the proviso which allow employment to be conditioned upon 'membership,'" the employer in that case, argued that "since the union's proposal [of an agency shop] does not require actual membership but demands only initiation fees and monthly dues, it is not saved by the proviso." *Id.* at 741-742.

It was common ground among all of the parties in *General Motors* that "[i]t is permissible to condition employment upon membership. . . ." 373 U.S. at 742. Starting from that premise, the Court added that it could "find nothing in the legislative history of the Act indicating that Congress intended the amended proviso to § 8(a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements permissible under state law." *Id.* at 741. To the contrary, the Court found that "there is much to be said for the Board's view that, if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act *the union shop*, then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the union." *Id.* at 743 (emphasis added).

On this basis—that the agency shop clause states a "less vigorous, less compulsory" form of union security than the undoubtedly lawful "union shop"—the *General Motors* Court concluded that the union's proposal was lawful.

ing agreement, but in response to a union request to join. And, to the extent the union security clause figures in the request it is through paraphrase and description, not through word-by-word quotation, as is common when lay people discuss legal documents and their meaning.

Precisely because Congress understood the realities, the NLRA provides that unions must accurately explain the meaning of the "membership" requirement in any discussion of the union shop clause with employees and that unions commit an unfair labor practice by failing to meet that obligation. The Act, as Congress wrote it, then, both furthers the collective bargaining process by permitting standard-form union shop clauses and protects the employee right to refrain from union activity by policing union (and employer) enforcement of the clause.

Indeed, the Board has held that "basic considerations of fairness obligate a union to notify newly hired employees of their rights under *Beck* and *General Motors*, at the time the union first seeks to obligate these newly hired nonmember employees to pay dues." Pet. App. 17a.[4] *Accord Abrams v. Communications Workers*, 59 F.3d 1373, 1379-80 (D.C. Cir. 1995) (requiring union notice explaining legal rights under union security clause); *Nielsen*, 94 F.3d at 1115 (same); *Marquez*, 124 F.3d at 1042 (same). While the Sixth Circuit dismisses the impact of such a notice, we submit that Judge Posner got things right when he observed in *Wegschied v. Local Union 2911, U.A.W.*, 117 F.3d 986, 987 (7th Cir. 1997), that employees who have received "emphatic assurances by the union . . . that they don't have to join the union or pay anything more than the agency fee . . . would have a hard

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[4] Accordingly, the Board's order in this case requires the Unions to

> notify each Weyerhaeuser Paper Company unit employee in writing of their rights and information necessary and relevant for the exercise of such rights under the *Beck* decision including the information that they are not required to become or

time persuading anyone that the collective bargaining agreement should be changed in order to protect them. . . ." 117 F.3d at 990.[5]

Because all that is true, Congress in delineating the permissible form of a union shop clause put industrial stability considerations first and, to facilitate collective bargaining, permitted the use of a simple term of art.[6] It was not the intent of Congress that a union security clause serve as a form of employee notice; rather as the words of the first proviso to § 8(a)(3) make clear, Congress intended that a union shop clause would serve the same office as the other terms of a collective bargaining agreement

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remain members of Respondent Unions as long as they pay a service fee and are financial core members. [Pet. App. 22a.]

And, it is very much to the point in this regard, that an employee covered by a union shop clause who has opted to become a full union mmeber is "not required to remain" a full union member in a very strong sense of that term—such an employee has the right to resign at will. *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

[5] At the same time, we note that Judge Posner could not have been more wrong in his assertion that "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about thier right not to join the union." 117 F.3d at 990. As we have explained, the "only realistic explanation" for such language is that the parties have been instructed for fifty years now by Congress and by the NLRB that these are the settled and accepted words of art through which one formulates a lawful union security clause.

[6] Terms of art are, of course, commonly used in drafting contracts and that it is frequently the case that the full legal significance of a term in a collective bargaining agreement cannot be determined from a literal reading of the contract language. *See, e.g., Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (agreement to arbitrate entails implicit agreement not to strike over arbitrable issue). Indeed, for a union security clause to fully explain the rights and obligations of covered employees it would have to "cite every exception that might apply, including, in addition to *Beck* rights, the right to be a religious objector, the right not to pay if a union rejects the employee's membership application, or the right to be relieved of initiation fees." *Nielsen*, 94 F.3d at 1113-14.

—the office of setting the rights and obligations of the parties to the contract, *i.e.*, the employer and the union.

The true test of whether a union security clause is facially valid, then, is whether the clause establishes a lawful relationship between the parties. Where a clause uses the formulation approved by Congress it is obviously capable of lawful application and enforcement, and, therefore, passes the test of legality that Congress set out in § 8(a)(3). Thus, as the D.C. Circuit stated in *Honolulu Star-Bulletin, Ltd. v. NLRB*, 274 F.2d 567, 570 (D.C. Cir. 1959), "assumptions that employees will not understand a lawful contract cannot be a basis for holding the contract illegal." And, as this Court added in *NLRB v. News Syndicate Co.*, 365 U.S. 695, 700 (1961), a "contract cannot be held illegal because it fail[s] affirmatively to disclaim all illegal objectives." [7]

Requiring that union security clauses state the various legal restrictions on their application would, in short, upset a large number of established collective bargaining agree-

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[7] It is worthy of note that after this Court's *News Syndicate* decision the NLRB ended its insistance that union shop clauses follow the *Keystone* model because "in the face of this explicit language of the Supreme Court, . . . [it would] not [be] . . . sound adminstrative practice . . . to continue applying a rule with respect to union-security provisions which indulges in precisely the type of presumption of illegality frowned upon by the Supreme Court." *Paragon Products Corp.*, 134 NLRB 662, 664 (1961), discussing the passage from *News Syndicate*, 365 U.S. at 700, quoted in text. The Board observed that judging the validity of union security clauses against the *Keystone* model had an "extremely unsettling impact upon established collective-bargaining relations" in that "a substantial bulk of the contracts containing perfectly legal union-security provisions cannot meet the strict test required by *Keystone*, i.e., that they expressly reflect the statutory language." *Paragon Products Corp.*, 134 NLRB at 664. Of course, the Board continued to find clauses that conformed to its *Keystone* model to be facially lawful. *See Electrical Workers, I.U.E. Local 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1993) ("the clause, with its phrase 'members of the Union in good standing . . .' is capable of a lawful construction"), *aff'd in relevant part, I.U.E. v. NLRB, supra*, 41 F.3d at 1538-39.

ments and disrupt industrial peace by forcing employers and unions back to the bargaining table to wrangle over what constitutes a proper statement of the set of obligations that run primarily to the unions, contrary to Congress' judgment and for no useful purpose.

CONCLUSION

This Court should issue a writ of certiorari to review the decision of the Sixth Circuit in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 96-5139

ROLAND BUZENIUS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED PAPERWORKERS INTERNATIONAL UNION,
UNITED PAPERWORKERS INTERNATIONAL UNION,
LOCAL 1033,
Intervenors.

Argued Feb. 7, 1997
Decided Sept. 8, 1997

Before: SILER and BATCHELDER, Circuit Judges; HULL, District Judge.*

BATCHELDER, Circuit Judge.

In this case we must decide whether a union-security clause requiring employees to become and remain "members of the Union in good standing" as a condition of continued employment, without concurrent definition in the collective bargaining agreement, is facially valid. For

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* The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

the following reasons, we hold that it is not. We therefore REVERSE the order of the National Labor Relations Board.

I. BACKGROUND

The facts of this case are undisputed. The United Paperworkers International Union, AFL CIO, CLC, and its Local 1033 (collectively the "Union") are the exclusive collective bargaining representatives of Weyerhaeuser Paper Company's ("Company") production and maintenance employees. The Union and the Company entered into a collective bargaining agreement ("CBA") containing the following union-security clause:

> It is agreed that all employees who are members of the Union shall remain members of the Union in good standing. All new employees, who after completion of thirty (30) days shall become and remain members of the Union in good standing as a condition of employment for the term of this Agreement [sic].

The CBA does not define "member in good standing." Additionally, the Union has no procedure to provide employees with information regarding their right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to the Union's core representational activities. *See Communications Workers v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 694 (1988); *NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963).

Petitioner Roland Buzenius works for the Company and was a member of the Union. On April 30, 1993, petitioner informed the Union by letter of his immediate resignation from the Union's membership in accordance with the Supreme Court's decision in *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 S.Ct. 3064, 87 L.Ed.2d 68 (1985). Petitioner also asserted his right under *Communications Workers v. Beck*, 487 U.S. 735,

108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), to object to supporting financially the Union's non-collective bargaining activities. The Union, however, ignored petitioner's letter and continued to deduct dues from petitioner's paycheck in the same amount it had prior to petitioner's resignation. Moreover, in November 1993, the Union mailed petitioner a new Union-membership card.

Petitioner filed a charge against the Union with the National Labor Relations Board ("NLRB" or "Board"). The Board ruled that the Union violated § 8(b)(1)(A) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158(h)(1)(A), by failing to acknowledge petitioner's resignation from the Union; failing to inform petitioner and all other Company employees of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963), and *Beck*; and collecting and using petitioner's full union-membership fees. *United Paperworkers Int'l Union*, 320 N.L.R.B. 349 (1995). The Board issued an order requiring the Union to cease and desist from the unfair labor practices and to undertake a number of remedial actions, including notifying each Company employee in writing of his rights under *General Motors* and *Beck* and that the only required condition of employment under the union-security clause in the payment of any uniform initiation fee and the "financial core" membership service fees. The Board also ordered the Union to post notice at Union business offices and local meeting halls for sixty consecutive days stating that the Union will not restrain and coerce Company employees from exercising their rights. The Board, however, refused to order the Union to expunge or modify the union-security clause. Petitioner timely appealed.

II. DISCUSSION

Petitioner challenges the Board's order to the extent that it allows the union-security clause to remain in the CBA. Petitioner argues that the plain language of the

clause patently misleads employees regarding their obligations as defined by the Supreme Court. Therefore, petitioner claims, the clause is facially invalid and the Board abused its discretion in failing to order its expunction from the CBA. We agree.

A.

Section 10(c) of the Act empowers the Board, upon finding that a party has committed an unfair labor practice, to issue an order requiring the offending party to "cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). "This statutory command vests in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *NLRB v. Joyce Western Corp.*, 873 F.2d 126, 128 (6th Cir.1989) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99, 104 S.Ct. 2803, 2812-13, 81 L.Ed.2d 732 (1984)). Accordingly, our review is limited to determining whether the Board has abused its discretion in fashioning the remedial order. *Id.*

B.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in hiring, tenure, or terms or conditions of employment for the purpose of encouraging or discouraging membership in a labor organization. 29 U.S.C. § 158(a)(3). Standing alone, this provision seems to prohibit union-security clauses. Clearly an employer "encourages" union membership by agreeing to such a clause in a CBA. Section 8(a)(3), however, goes on to state that "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the

beginning of such employment or the effective date of such agreement, which ever is the later." *Id.* In other words, the Act explicitly permits an employer to enter into a CBA that contains a union-security clause requiring employees to acquire and retain "membership" in a union as a condition of employment.

"Membership" as used in § 8(a)(3), however, does not mean membership in the colloquial sense, *i.e.*, formal union membership. Indeed, over the years the Supreme Court has significantly limited the concept of union membership for purposes of union-security clauses. In *NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1458, 10 L.Ed.2d 670 (1963), the Court whittled the "membership" that may be required under § 8(a)(3) down to its "financial core," stating that "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." *See also Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 41-42, 74 S.Ct. 323, 335-36, 98 L.Ed. 455 (1964) (stating that union-security clauses cannot be used for "any purpose other than to compel payment of union dues and fees"). Further, in *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106, 105 S.Ct. 3064, 3070, 87 L.Ed.2d 68 (1985), the Court explained that the union security clauses authorized by § 8(a)(3) require only that employees pay dues; full union membership may not be a condition of employment. Indeed, such a requirement would be inconsistent with the Act's policy of voluntary unionism. *See id.* at 104, 106, 105 S.Ct. at 3069, 3070; *see also Bloom v. NLRB*, 30 F.3d 1001, 1003-04 (8th Cir.1994).

The Court revisited the concept of "financial core" union membership in *Communications Workers v. Beck*, 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988). At issue in *Beck* was "whether th[e] 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract adminis-

tration, and grievance adjustment." *Id.* at 745, 108 S.Ct. at 2648. The Court held that it does not. Section 8(a)(3) allows a union to exact only "those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.' " *Id.* at 762-63, 108 S.Ct. at 2657-58 (quoting *Ellis v. Brotherhood of Ry., Airlines & Steamship Clerks,* 466 U.S. 435, 448, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 423 (1984)). In short, § 8(a)(3) of the Act "permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees [related to the union's representational activities] as a condition of continued employment, whether or not the employees otherwise wish to become union members." *Id.* at 738, 108 S.Ct. at 2644. The *Beck* Court did not address the question of what language is permissible in a union-security clause.

To summarize, § 8(a)(3) of the Act explicitly allows union-security clauses that require union "membership" as a condition of employment. 29 U.S.C. § 158(a)(3). Read literally, this section authorizes an employer and a labor organization to enter into a CBA compelling all employees to join the union and pay full union dues. However, according to the Supreme Court, § 8(a)(3) means no such thing. All that may be required under a union-security clause is the payment of fees and dues related to core representational activities.

C.

The issue in this case is not whether union-security clauses are valid in general, which they clearly are. *See id.*; *Beck,* 487 U.S. at 738, 108 S.Ct. at 2644. Rather, the issue is whether, in light of the language of § 8(a)(3) and the subsequent Supreme Court decisions interpreting that language, a union-security clause that requires "membership in good standing," without concurrent definition

of that term in the collective bargaining agreement, is valid. We hold that it is not.

1.

Few federal courts have squarely addressed the facial validity of union-security clauses like the one presented by the instant case. Indeed, our research reveals, and the parties have directed our attention to, decisions from only two federal circuit courts. In *International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers v. NLRB*, 41 F.3d 1532 (D.C.Cir.1994) ("IUE"), the District of Columbia Circuit upheld a union-security clause requiring all members of the bargaining unit to join and remain "members of the Union in good standing as a term and condition of employment." *Id.* at 1535 (emphasis omitted). The court held the clause to be facially valid for two reasons. First, although the Supreme Court's decisions in *Pattern Makers'* and *Beck* whittled down the membership that may be required under a § 8(a)(3) union-security clause, neither decision addressed the permissible language of such a clause. *Id.* at 1539. Second, the plaintiff presented no evidence indicating that the union actually required "full" membership or extracted funds from unwilling employees unrelated to the union's core representational activities. *Id.; see also Abrams v. Communications Workers*, 59 F.3d 1373, 1378-79 (D.C.Cir.1995) (applying *IUE* without discussion).

Similarly, in *Nielsen v. International Ass'n of Machinists & Aerospace Workers*, 94 F.3d 1107 (7th Cir.1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 1426, 137 L.Ed.2d 636 (1997), the Seventh Circuit held that a union-security clause stating that "[a]s a condition of continued employment, all employees . . . shall either become a member of the Union and pay dues thereto, or . . . shall pay an amount equal to the Union's initiation fee and . . . the regular monthly dues and fees in effect for other

employees in the bargaining unit who are members of the Union" was facially valid. *Id.* at 1108-09. The court agreed with the reasoning of the District of Columbia Circuit and concluded that *Beck* does not call into question the facial validity of such clauses. *Id.* at 1115. The *Nielsen* court also noted that the Board has never cast doubt on the facial validity of union-security clauses. *Id.* at 1114-15.

Although it did not specifically address the facial validity of the union-security clause at issue, the Eighth Circuit, in *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir.1994), provided considerable insight into the problems such clauses create. The CBA in *Bloom* contained a union-security clause stating that employees must "become and remain members in good standing in the Union" as a condition of continued employment. *Id.* at 1002. Pursuant to the CBA, plaintiff's employer withheld initiation fees and union dues from plaintiff's paycheck without his authorization. When the union mailed plaintiff a letter asking him to complete and sign a union-membership application, plaintiff refused, demanding that the union first provide him with a breakdown of how the union dues were spent. The union provided plaintiff with a categorization of union expenditures, but did not outline the percentage of dues and fees that were spent on nonrepresentational activities. Moreover, the union did not advise plaintiff of his rights under *Beck*. The union did, however, inform plaintiff that unless he completed the application, it would seek termination of his employment. Plaintiff subsequently filed unfair-labor-practice charges with the Board, which the union and plaintiff's employer settled. On appeal to the Eighth Circuit, plaintiff challenged the propriety of the settlement, arguing that it was inadequate because it allowed the union-security clause to remain in the bargaining agreement. *Id.* at 1002-03.

The Eighth Circuit agreed with plaintiff. The court stated that the clause was patently misleading: "An em-

ployee who is unfamiliar with the Supreme Court cases discussing union security provisions is likely to conclude that the clause requires exactly what it says—'[membership] in good standing in the Union.'" *Id.* at 1004 (alteration in original); *see also Schreier v. Beverly California Corp.*, 892 F.Supp. 225, 227 (D.Minn.1995) (applying *Bloom* to invalidate a union-security clause that required "membership in good standing" and noting that "[t]he union security clause itself is unlawful and has the clear capacity to mislead employees"). In other words, read literally, the clause leads employees to believe that they must become full-fledged union members as a condition of employment, a conclusion directly at odds with Supreme Court precedent. In order to correct this problem, the union offered to post notice for sixty day informing employees that they need only pay the union's periodic dues and initiation fees. The court found, however, that because a literal application of the "member in good standing" provision is unlawful, posting a temporary notice that the union-security clause will not be enforced as drafted is not enough to protect employees' right to refrain from union activities. *Bloom*, 30 F.3d at 1005. Because the union-security clause was unlawfully interpreted and applied, and because the settlement agreement did not expunge the misleading clause, the court held the settlement agreement inadequate. *Id.*

2.

We agree with our sister circuits' assertion that the Supreme Court has never explicitly delineated the permissible language of a § 8(a)(3) union-security clause. Indeed, the Court has never squarely faced that issue. We do not agree, however, with the contention that the Supreme Court's silence validates a union-security clause requiring "membership in good standing" without further explanation in the CBA. We believe that in light of the Court's decisions whittling § 8(a)(3) "membership" down

to its financial core, such clauses, without concurrent definition in the CBA itself, are facially invalid. To permit the CBA to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation.

One of the Act's core policies is that of voluntary unionism. *Pattern Makers'*, 473 U.S. at 104-06, 105 S.Ct. at 3069-70; *Bloom*, 30 F.3d at 1003 (citation omitted). Although employees subject to a § 8(a)(3) union security clause are obligated to pay dues and fees related to the union's core representational activities, *Beck*, 487 U.S. at 762-63, 108 S.Ct. at 2657-58 they remain free to join or refuse to join the union. *Pattern Makers'*, 473 U.S. at 106, 105 S.Ct. at 3070. A union-security clause requiring "membership in good standing" as a condition of employment, however, leaves employees with the distinct impression that they are not free to make that choice. The plain language of such clauses is clear—join the union or be fired. As the Eighth Circuit stated in *Bloom*, 30 F.3d at 1004: "We fail to see how an employee can discern from such language that he cannot be terminated if he does not wish to become a formal, full-fledged union member burdened with all of the obligations of union membership and subject to the full reach of the union's disciplinary measures." Similarly, though the Board has found union-security clauses of this type to be facially valid, *see Rochester Mfg. Co.*, 323 N.L.R.B. No. 36, 154 L.R.R.M. (BNA) 1249, 1251 (March 12, 1997), it has recognized their deceptive nature:

> Thus, although the clause is capable of lawful construction, it can also be interpreted as requiring more from [bargaining] unit employees than is imposed by statute. Indeed, it is likely that employees unversed in the intricacies of Section 8(a)(3) and interpretative decisions will literally interpret the clause as requiring full membership and all attendant financial

> obligations, e.g., assessments. At a minimum, they will be confused about their obligations.

International Union of Electronic, Elec., Salaried, Mach. & Furniture Workers, 311 N.L.R.B. 1031, 1037 (1993) (footnote omitted), *enforcement denied*, 41 F.3d 1532 (1994). A "membership in good standing" union-security clause is inconsistent with the Act's policy of voluntary unionism because it misleads employees into believing that they may not exercise free choice in the matter of union membership.

Allowing a union-security clause requiring union "membership in good standing" to remain unmodified in the CBA turns normal contract interpretation on its head. Under the Board's remedial order, employees must consult extraneous sources and subsequent notices in order to discover that they have a right not to do what the plain language of the clause requires. Because the clause does not mean what it literally says, and because its literal application is unlawful, the clause has no place in the CBA. Subsequent notice of the employees' actual rights under § 8(a)(3), whether by posting temporary notice or by providing employees with one-time written notice, will not rectify the situation. *See Bloom*, 30 F.3d at 1005. Once Company employees receive their one-time notice, the Board's order provides no other measure to inform employees of their rights and lawful obligations under the union-security clause. However, the union-security clause, which cannot mean what it says and cannot be applied as drafted, remains in the CBA, the on-going contract by which the employees' relationship to the employer is governed. We cannot agree with such a result.

We recognize that Congress, through § 8(a)(3), has sanctioned union-security clauses requiring union "membership" as a condition of employment. *See* 29 U.S.C. § 158(a)(3). We also recognize that a union-security clause requiring "membership in good standing" comports with the *literal* meaning of § 8(a)(3). However, as pre-

viously discussed, § 8(a)(3) does not mean what it literally says. Indeed, as the Seventh Circuit has recently pointed out, the Supreme Court has glossed the statute in a way that virtually inverts the literal meaning. *Wegscheid v. Local Union 2911, Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 117 F.3d 986, 990 (7th Cir.1997). The Court has not simply carved out exceptions to § 8(a)(3)'s language; it has ruled that the most that may be required under that section is the payment of dues and fees related to core representational activities. *Beck*, 487 U.S. at 762-63, 108 S.Ct. at 2637-38. The plain language of § 8(a)(3) and its actual meaning in light of Supreme Court precedent are so dissimilar that "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Wegscheid*, 117 F.3d at 990 (citations omitted).

In the present case, the Union has wholly failed to persuade us otherwise. The Union has provided no legitimate reason explaining why it needs to include "membership in good standing" language, without further definition, in the CBA. Nor has the Union explained how requiring that the clause be modified to reflect § 8(a)(3)'s true meaning and employees' true obligations would impose an undue hardship. For these reasons, and because of the clause's misleading nature, the Union may not hide behind § 8(a)(3) to justify this practice. *See id.* at 991.

III. CONCLUSION

The union security clause in the instant case requires employees to become and remain "members of the Union in good standing." Because the express language of this clause is inconsistent with employees' right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities, and because the clause cannot be interpreted without resort to material outside of the CBA, we hold that the clause is facially invalid. We therefore hold that the

Board abused its discretion in refusing to order that the clause requiring that employees be "members of the Union in good standing" either be modified to define that requirement or be removed from the CBA. Accordingly, we REVERSE the order of the National Labor Relations Board.

APPENDIX B

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 7-CB-9732(1) & (2)

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, CLC, and its LOCAL UNION No. 1033 (WEYERHAEUSER PAPER CO.) and ROLAND BUZENIUS

December 20, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING, COHEN, AND TRUESDALE

The judge in this case [1] has found, inter alia, that the Respondents breached their duty of fair representation, in violation of Section 8(b)(1)(A) of the Act, by failing to advise Charging Party Roland Buzenius and all other unit employees who were subject to a union-security agreement of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Communications*

[1] On March 25, 1994, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondents and the Charging Party each filed exceptions and a supporting brief. The General Counsel filed limited exceptions and a supporting brief. The Respondents filed separate answering briefs in response to the Charging Party's exceptions and to the General Counsel's limited exceptions. The Charging Party filed an answering brief to the Respondents' exceptions. The Respondents filed a brief in reply to the Charging Party's answering brief.

Workers v. Beck, 487 U.S. 735 (1988).[2] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[3] as further discussed below, and to adopt the recommended Order as modified.[4]

In affirming the judge's finding of a violation for the failure to give notice of *Beck* and *General Motors* rights, we rely on the analysis of these rights in *California Saw & Knife Works*, 320 NLRB 224 (1995), issued today. The Board found that the union in *California Saw* violated its duty of fair representation by failing to provide notice of *Beck* rights to unit employees covered by a union-security agreement who were not members of the union.[5] In making this finding, the Board observed the

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[2] In *General Motors*, the Supreme Court described an employee's "membership" obligation under a union-security clause, as permitted by the proviso to Sec. 8(a)(3) of the Act, as "whittled down to its financial core." 373 U.S. at 742. Thus, the *"General Motors"* right is to pay an amount equivalent to union initiation fees and dues.

[3] We agree with the judge that the Respondents' collection and use of full service fees from Charging Party Buzenius violated Sec. 8(b)(1)(A). We do not rely on his conclusion that such conduct also violated Sec. 8(b)(2). See *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 330 (1991).

[4] The Respondents except to the judge's recommended remedial requirement that it reimburse Buzenius for all dues collected since his resignation from membership and filing of a *Beck* objection. We agree that the Respondents were still entitled to collect dues for expenses related to representational activities. We shall modify the relevant recommended Order and notice provisions to require reimbursement only of dues determined to be in excess of the amount that the Respondents could lawfully collect under *Beck*.

We also find merit in the General Counsel's exception to the judge's failure to recommend that the Respondents maintain and preserve records necessary to determine the amount of back dues owed to Buzenius. We shall modify the recommended Order to include a recordkeeping provision.

[5] For the reasons stated in fn. 47 of *California Saw*, Chairman Gould finds that it is appropriate here to resolve issues of *Beck* and

close connection between the right of a nonmember employee under *Beck* to limit payment of union-security dues and initiation fees to certain moneys spent on activities germane to a union's role as collective bargaining representative and the right under *General Motors* to be and remain a non-member subject only to the duty to pay union initiation fees and periodic dues. Simply stated, an employee cannot exercise *Beck* rights without exercising the General Motors right. In light of this close connection, the Board stated that "in order to fully inform non-member employees of their *Beck* rights, a union must tell them . . . of their *General Motors* right to be and remain nonmembers." Id. at fn. 57.

The complaint and decision in *California Saw* directly addressed only the rights of nonmember employees under *Beck*. The decision in that case resolved that issue and the closely related issue of the rights of non-members under *General Motors*. The complaint in the instant case alleges the unlawful failure to inform *all unit employees*, including those who are still members of the Union, of their rights under *Beck* and *General Motors*. We find that the rationale of *California Saw* for concomitant notice of *Beck* and *General Motors* rights applies with no less force to those who are still full union members and who did not receive those notices before they became members. Current members must be told of their *General Motors* rights if they have not previously received such notice in order to be certain that they have voluntarily chosen full membership and a concomitant relinquishment of *Beck* rights.

In *California Saw*, the Board observed that newly hired nonmembers employees are typically presented at the commencement of their employment with both a union mem-

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General Motors notice violations directly under Sec. 8(b)(1)(A)s' prohibition against restraint and coercion rather than under duty of fair representation standards as set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967).

bership application form and a dues-check-off authorization form. We emphasized that the presentation of these documents to newly hired nonmember employees, absent concurrent notification of *Beck* rights and the right under *General Motors* to be and remain nonmembers, might mislead these newly hired nonmember employees to believe that payment of full dues and assumption of full membership is required. Because of this potential to mislead employees, we held that the union acted arbitrarily and in bad faith in violation of the duty of fair representation by failing to give notice of *Beck* rights to newly hired nonmember employees.[6] We accordingly held that basic considerations of fairness obligate a union to notify newly hired nonmember employees of their rights under *Beck* and *General Motors*, at the time the union first seeks to obligate these newly hired nonmember employees to pay dues.

These same considerations require that union members receive such notice, if they did not receive notice of their *Beck* and *General Motors* rights at the time they entered the bargaining unit. Notice to these members assures that they have not been misled to believe that payment of full dues and assumption of full membership is required. This notice requirement is satisfied by giving the unit employee notice once and is not a continuing requirement. Thus, newly hired nonmembers must be given *Beck* and *General Motors* notice once—at the time the union first seeks to obligate them to pay dues.[7] The same notice to members

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[6] As in this case, Chairman Gould found it appropriate in *California Saw* to resolve the *Beck* and *General Motors* notice violations under Sec. 8(b)(1)(A) rather than under duty of fair representation standards as set forth in *Vaca v. Sipes*, supra.

[7] Member Cohen notes that there is no record evidence in this case of a union requirement that a *Beck* objection, in order to remain valid, must be repeated each year. (In *California Saw*, there was such a requirement, but the General Counsel did not attack it. See fn. 41 of *California Saw*.) In cases where there is such a "repeating" requirement, Member Cohen would impose a corre-

is likewise required to be given once, if they have not previously received it. The form of such notice is not prescribed by the Board, moreover, and "the union meets [its] obligation as long as it has taken reasonable steps" to notify employees of their *Beck* rights before they become subject to obligations under the union-security clause. *California Saw & Knife*, supra, slip op. at 10. The same holds true of their *General Motors* rights.

These notice requirements furnish significant protection to the interests of the individual unit employee vis-a-vis *Beck* rights, without compromising the countervailing collective interests of bargaining unit employees in ensuring that every unit employee contributes to the cost of collective-bargaining activities.

Accordingly, we hold that in order for all unit employees subject to a union-security provision to exercise their *Beck* rights meaningfully, the law requires that notice of those rights include notice that the only way in which they can do so is to exercise the right under *General Motors* to become nonmembers. On this basis, we affirm the judge's finding that the Respondents violated Section 8(b)(1)(A) of the Act by failing to give the requisite notice.

We do not view this opinion, or the one in *California Saw*, as being inconsistent with the court's opinion in *Paramax*.[8] The Board's opinion in *Paramax* was premised on the alleged ambiguity of the union-security clause. The Board held that, in view of that ambiguity, a union was required to give employees notice as to what their obligations were. The court rejected this position. In doing so, the court noted that the Board had previously blessed an identical clause. By contrast, the violation in

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sponding requirement on the union to repeat its notice each year prior to the annual window period.

[8] *Electronic Workers IUE v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), denying enf. to *Electronic Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993).

the present case is *not* premised on any ambiguity in the union-security clause. We hold that, without regard to the precise language of a union-security clause, a union has an obligation (as described here and in *California Saw*) to tell employees of the statutory limits on union-security obligations.

In addition, as discussed supra, this decision and the one in *California Saw* are premised essentially on *Beck* rights. In these cases, *General Motors* rights are involved only because they are inextricably related to *Beck* rights. At the time of the events here, there was a considerable body of law concerning a union's obligation to tell employees of their *Beck* rights.[9] Thus, the Respondent can hardly complain that, at the time of the events here, it had no warning that notices would be required.

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[9] See *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 297, 306 (1986); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); and *Abrams v. Communications Workers*, 59 F.3d 1373, 1378-1381 (D.C. Cir. 1995), affg. in part and revg. in part 818 F.Supp. 393 (D.D.C. 1993). See also 884 F.2d 628 (D.C. Cir. 1989).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, United Paperworkers International Union, AFL-CIO, CLC, and its Local Union No. 1033, Three Rivers, Michigan, their officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Failing to notify unit employees of their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), including the information that unit employees are not required to become or remain members of the Respondent Unions as long as they are financial core members in accordance with *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963)."

2. Substitute the following for paragraph 2(d).

"(d) Reimburse Roland Buzenius, with interest, for any fees exacted from him for nonrepresentational activities since his resignation from union membership."

3. Insert the following as paragraph 2(e), and reletter the subsequent paragraphs.

"(e) Preserve and, on request, make available to the Board or agents, for examination and copying, all records necessary to verify the amounts of reimbursement due to Roland Buzenius."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT restraint and coerce you in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act by failing to notify you of your rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), including the information that you are not required to become or remain members of Respondent Unions as long as you are a financial core member in accordance with *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

WE WILL NOT refuse to acknowledge Roland Buzenius' resignation from membership.

WE WILL NOT fail to establish an appropriate service fee for financial core members consistent with the Supreme Court's *Beck* decision.

WE WILL NOT continue to collect from Roland Buzenius union membership fees for expenses that are not germane to our representational activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rightas guaranteed you by Section 7 of the Act.

WE WILL notify each Weyerhaeuser Paper Company unit employee in writing of their rights and information necessary and relevant for the exercise of such rights under the *Beck* decision including the information that they are not required to become or remain members of Respondent Unions as long as they pay a service fee and are financial core members.

WE WILL establish an appropriate service fee for financial core members consistent with the *Beck* decision.

WE WILL refund with interest all membership dues withheld and collected from Ronald Buzenius since his resignation from membership on May 30, 1993, that are for expenses that are not germane to our representational activities.

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, CLC, AND ITS LOCAL UNION NO. 1033

Howard M. Dodd, Esq., for the General Counsel.

Carol Bush, Esq., of Nashville, Tennessee, for the Respondent.

Barry Smith, Esq., of Kalamazoo, Michigan, for the Employer.

John Scully, Esq., of Springfield, Virginia, for the National Right to Work Foundation.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Kalamazoo, Michigan, on December 8, 1993. Subsequent to an extension in the filing date briefs were filed by the General Counsel, the Respondent, and the Right to Work Foundation. The proceeding is based on charges filed June 23, 1993,[1] by Roland Buzenius, an individual. The Regional Director's consolidated complaint dated August 5, 1993, alleges that Respondent United Paperworkers International Union, AFL-CIO, CLC, and its Local Union No. 1033 violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act by refusing to accept or acknowledge Buzenius' resignation of his membership in Respondents, failing to advise Buzenius and other employees that they are not required to become or remain members of the Respondents as long as they are financial core members, failing and refusing to give Buzenius notice of his rights and information necessary and relevant to exercise his rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to the use of his service fees for purposes not germane to Respondents' role as his exclusive collective-bargaining representative, and continuing to collect and use Buzenius' service fees for purposes not germane to their role as his exclusive collective-bargaining representative.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

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[1] All dates are 1995 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Employer, Weyerhaeuser Paper Company, is a corporation engaged in the manufacture of paper products at a facility in Three Rivers, Michigan, and it annually ships goods valued in excess of $50,000 from its location to points outside Michigan and at all times has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act and at all material times Respondent International and Respondent Local 1033 have been the exclusive collective-bargaining representative for a unit of all production and maintenance employees employed by the Employer at its facility at Three Rivers, Michigan, including the Charging Party.

II. THE ALLEGED UNFAIR LABOR PRACTICES

At all material times Respondent International, Respondent Local 1033, and the Employer have been parties to a collective-bargaining agreement which contains a provision which states:

> It is agreed that all employees who are members of the Union shall remain members of the Union in good standing. All new employees, who after the completion of thirty (30) days shall become and remain members in good standing as a condition of this employment.

Buzenius has worked for the Employer for 15 years, was a member of the Respondents, and served as its local president in 1990 and 1991. By letters dated April 30, he resigned his membership in both the Local and the International. The text of the letter reads as follows:

> In accordance with the U.S. Supreme Court's decision in *Patternmakers v. NLRB*, I hereby resign as a

member of U.P.I.U. Local 1033, effective immediately.

Under the U.S. Supreme Court:s [sic] decision in *Communications Workers of America v. Beck*, I hereby declare myself protected by financial core status as defined in the aforementioned decision of the U.S. Supreme Court.

Please return any reduced dues owed to me, and charge me for the new appropriate amount in compliance with the requirements of *Beck*.

Prior to his resignation, Buzenius' dues were deducted directly from his paycheck and since his resignation, the Respondents have continued to deduct the same amount for Buzenius' service fee as they did for his dues prior to his resignation. The Respondents have made no attempt to stop Buzenius' service fee deductions nor to reduce the amount of his service fee. Neither the Local nor the International has ever advised Buzenius of his rights under *Beck* or that under the union-security clause he can maintain employment at the Employer by becoming a financial core member of the Respondents and they have not established nor implemented any procedures under *Beck*. In November Buzenius received a letter from the International enclosing his new membership card for 1994 and 1995.

While president of Local 1033, Buzenius, negotiated the current collective-bargaining agreement between Respondents and Weyerhaeuser. He signed it as president of Local 1033 and he was aware of the specific union-security language contained in this agreement prior to and during negotiations. He executed this agreement on behalf of Local 1033 on June 25, 1990. Robert Sobezak Sr. (then vice president and chief steward of Local 1033, who succeeded Buzenius as president of Local 1033 in January 1992) testified that he and Buzenius attended a financial

officers' training class sponsored by the Union in the spring of 1990 at which Buzenius commented to him "you don't have to pay your dues. Do you know that? You don't have to pay your dues."

III. DISCUSSION

Here, the General Counsel has clearly established that the Charging Party sent a letter of resignation that was never recognized, that the Union never responded with any notice of his *Beck* rights, or information relative to the exercise of those rights and that the Union never accounted for or made any reduction of or reimbursement of dues withheld.

The Respondents' defense is based on the arguments that (1) Buzenius' letter of resignation was unclear and lacked specificity, (2) that Respondents had no affirmative duty to provide *Beck* rights notice or information, (3) that because Buzenius was motivated by a strong desire to become a "free rider" Respondents owed him no fiduciary obligations, and (4) that Buzenius waived any claim regarding the legality of the union-security clause because he, on behalf of the Union, previously negotiated and on June 25, 1990, signed the current bargaining agreement containing the controlling language.

Turning first to the latter defense it is clear that Buzenius' knowledge of this language in early 1990 is irrelevant since it did not become applicable to his situation until his subsequent resignation and I also find that he could not know then of the potential illegality established when *Electronic Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993), was issued on May 28, 1 day before he mailed his resignation. I also find no unambiguous personal waiver inasmuch as Buzenius was acting on behalf of the overall Union's position on the union-security clause, not his own position, a position he was free to change for reasons otherwise noted below.

In connection with this argument, the Respondents also argue that the *Paramax* violation alleged in the consolidated complaint is time barred under Section 10(b) of the Act.

First, as noted by the General Counsel, the charge was filed June 23 and *Paramax* was decided May 28, less than a month earlier. Prior to that time, union-security clauses —similar to the one here—were not considered as ambiguous nor potentially illegal and Buzenius' prior knowledge of the union-security clause language is irrelevant as the time limits could not begin to run until after *Paramax* issued. Moreover, a *Paramax* violation is not, as discussed below, a per se violation but is in the nature of a continual violation that can be triggered, not merely by the negotiation or execution of a collective-bargaining agreement, but by a union's failure to respond or provide information once an employee makes an inquiry or attempts to avail himself of rights not clearly explained in a union-security provision. The ambiguity and taint of illegality becomes apparent at that point and thereby sets a reference point for the 10(b) period and, accordingly, none of the allegations here are time barred.

I also find that Respondents' defense regarding the clarity of Buzenius' resignation is strained at best. It would take a particularly obtuse reading of his communication with the Union to conclude anything other than that he was resigning his membership and did not want to pay any dues beyond that which he was obligated to (his service fee) for purposes of retaining employment under the union-security provision. Buzenius referred to *Beck* and asked for the "return of any reduced dues" and for the "charge" of a "new appropriate amount." To the extent that any ambiguity or lack of specificity remained, it was in areas within the control of the Respondents. Respondents had received adequate notice and the burden to respond, as well as the burden to clarify and provide

information, shifted to the Union at both the Local and International level to appraise Buzenius of his rights or of their compliance.

Here, the Respondents merely stonewalled. They failed to respond or act on the resignation and failed to reduce the amount of dues to a level consistent with an appropriate service fee. Their failure to respond in any way (except by issuing a new membership card), and their failure to provide any information whatsoever is the equivalent of providing false and inaccurate information and, as discussed below, constitutes a failure of the Union's responsibility to provide fair representation for all employees in a bargaining unit.

Just as a union may not discriminatorily deny a request for membership, *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), a union cannot refuse to accept a resignation of membership, both where there is no union-security clause, *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), and where such a provision in a collective-bargaining agreement provides for union representation of all employees, *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), and *Electronic Workers IUE Local 444 (Paramax Systems)*, supra. Whereas *Lockheed Space* finds that the refusal to accept the revocation of all payroll deduction of union dues, the *Paramax* decision draws on the decision in *Beck*, supra, and *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to find circumstances under which a failure to appraise unit employees that they need only tender applicable initiation fees to become and remain a "member" of the union in good standing is improper because such a clause is ambiguous in that it fails to appraise employees of the lawful limits of their obligations.

Here, the same clause is under examination and here the Respondents have failed to appraise the Charging Party or other unit members of their lawful limits of his obliga-

tions under the *Beck* decision (see p. 748), to pay to the Union:

> Only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer or labor-management issues. [*Ellis v. Railway Clerks*], 466 U.S. [435] at 448."

The Board's decision in *Paramax*, supra, issued in May 1993, concluded that the union-security clause in the underlying collective-bargaining agreement which contained a phrase requiring employees to be "members in good standing" was not illegal per se. That phrase, however, was found to be ambiguous and subject to a reasonable interpretation which could cause employees to believe that they were required to become and remain members of a union, contrary to the holding in *General Motors*. Accordingly, the Board held that any union that maintains a union-security clause similar to the one in *Paramax* would breach its duty of fair representation and violate Section 8(b)(1)(A) of the Act if it failed to advise employees of their rights under *General Motors* to maintain employment by becoming a financial core member without being required to become or remain a member of the Union.

Here, the underlying collective-bargaining agreement between Respondents and the Employer contains a union-security clause which requires employees to "become and remain members of the" Respondents, language that is virtually identical to that in *Paramax*. It is ambiguous and subject to a reasonable interpretation by employees that would lead them to conclude that they must become and remain members of the Respondents. Because of this ambiguity, the Respondents had and have a fiduciary duty to advise Buzenius and all other employees in the unit of their rights under *General Motors* and *Beck*. Neither the Local nor the International made any attempt to advise Buzenius or any other employee in the unit that they were

not required either to become or remain members of the Local or the International so long as they are financial core members even though they were alerted to this by his letter of resignation. It is clear that the Union here is the exclusive collective-bargaining representative of a unit, the agreement between it and the Employer has a union-security clause requiring "membership" in the Union as a condition of employment, a member of the unit resigned membership in the Union and he objected to the Union's use of his dues for purposes other than those required by law (for collective bargaining, contract administration, and grievance handling). These criteria were met and the Union's continued use of Buzenius' dues for purposes other than those enumerated violates Section 8(b)(1)(A) and (2). I also conclude that once a unit employee resigns and voices his objection, a union must establish a *Beck* procedure, notify the objecting nonmember of his rights under *Beck*, and cease collecting any fee from that person until it has established that the fee is being used exclusively for purposes permitted by *Beck*. If, as here, the union fails to establish an appropriate procedure and give the employee notice, it breaches its duty of fair representation and violates Section 8(b)(1)(A). If a union continues to collect its full dues as the service fee without establishing that the service fee is being used exclusively for representational purposes, it additionally violates Section 8(b)(2) of the Act.

Under these circumstances, I find that the Respondents have breached their duty of fair representation and I find that they are shown to have violated Section 8(b)(1)(A) and (2) of the Act, as alleged.

The Respondents also attempted to present evidence at the hearing that Buzenius was "illegally" motivated in withdrawing from the Respondents, and they contend that it Buzenius was motivated by the desire to become a free rider in attempting to resign his union membership and as-

sert *Beck* rights, then contrary to the General Counsel's contentions. Respondents had no fiduciary obligation to notify him that the term "members in good standing" found in the union-security clause of the pertinent collective-bargaining agreement meant only the payment of dues and fees.

As pointed out by the General Counsel, the purpose of the Act is to ensure that employees are free to choose whether or not they wish to become or remain members of a union. Motive is irrelevant. An employee has the right to join or resign full union membership for good cause, no cause, or a cause that some may view as morally indefensible. Buzenius' rights, and the rights of all other employees covered by the Act, to become or refrain from becoming a member of a union, are found in Section 7 of the Act and are rights that are absolute and not conditioned on motivation.

While at some future time the Board may find special circumstances (such as motivation that is tied in with an illegal effort on the part of an employer to decertify a union or an illegal conspiracy on the part of some group to interfere with a union's rights as a collective-bargaining representative), the conjecture here that Buzenius merely wanted to be a "free rider" fails to provide any valid reason to limit his rights in this case.

Although the Respondents on brief also request that this court's denial of enforcement of their subpoena of possible records from Buzenius that could be indicative of such a "free rider" motive be reversed, that request is denied for the reasons noted above.

Otherwise, I find no basis for finding (as urged by the Charging Party's representative) that the union-security clause itself is per se invalid, see the *Paramax* decision, supra.

CONCLUSIONS OF LAW

1. Respondents United Paperworkers International Union, AFL-CIO, CLC, and its Local Union No. 1033 are a labor organization within the meaning of Section 2(5) of its Act and have entered into and maintain a collective-bargaining agreement with the Employer, Weyerhaeuser Paper Company, that requires employees to become and remain members in good standing in the Union.

2. By refusing to acknowledge Roland Buzenius' resignation from membership in Respondents, failing and refusing to give him notice of his rights and information necessary and relevant for his exercise of his rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), and by failing to advise him and all other employees in the unit that they are not required to become or remain members of the Respondents as long as they are financial core members, the Respondents have violated Section 8(b)(1)(A) of the Act.

3. By continuing to collect and use Buzenius' full service fees without giving the appropriate *Beck* notice and by using his service fee for purposes not germane to their role as the exclusive collective-bargaining representative, Respondents have violated Section 8(b)(1)(A) and (2) of the Act.

4. The union-security clause is not per se unlawful.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices. I find it necessary to order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondents be ordered to notify each unit employee, in writing, of the employee's *Beck* rights.

Nothing here shall preclude the Respondents from negotiating a modification to the union-security provision with Weyerhaeuser Paper Company which unambiguously apprises unit employees of their lawful union-security obligations.

The Respondents also shall be required to establish an appropriate service fee for financial core membership consistent with the *Beck* decision and to acknowledge in writing Roland Buzenius' resignation. And, because the Respondents are shown to have willfully refused to acknowledge Buzenius' resignation while at the same time failing to establish an appropriate financial core service fee and continuing to wrongfully collect his full membership dues, in breach of Respondents' duties of fair representation, the Respondents have thereby failed to allow the computation of any accurate service fee amount and, accordingly, as the wrongdoer, Respondents shall be held accountable for the full amount of dues collected until such time as they toll their accountability by establishing an appropriate fee and apply it to Buzenius' core membership status. Accordingly, Respondents shall refund the full amount of dues collected from Roland Buzenius since his resignation on May 30, until the tolling of this responsibility by the action required above, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, United Paperworkers International Union, AFL-CIO, CLC, and its Local Union No. 1033, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining a union-security clause requiring that, as a condition of employment, Weyerhaeuser Paper Company, unit employees "become and remain members of the Union in good standing" without informing those employees of their rights and information necessary and relevant for the exercise of such rights under the decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), including the information that they are not required to become or remain members of the Respondent Unions as long as they are financial core members.

(b) Refusing to acknowledge Roland Buzenius' resignation from membership.

(c) Failing to establish an appropriate service fee for financial core members consistent with the *Beck* decision.

(d) Continuing to collect and use Buzenius' full union membership fees.

(e) In any like or related manner restraining or coercing Weyerhaeuser Paper Company employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Establish an appropriate service fee for financial core members consistent with the *Beck* decision.

(b) Notify each Weyerhaeuser Paper Company unit employee in writing of their rights and information necessary and relevant to the exercise of such rights under the *Beck* decision and that the only required condition of employment under the union-security clause is the tender-

ing of uniform initiation fees (if any) and financial core membership service fees.

(c) Acknowledge in writing Roland Buzenius' resignation from membership and henceforth collect from him only a financial core membership service fee consistent with the *Beck* decision.

(d) Refund with interest all membership dues withheld and collected from Roland Buzenius since his resignation from membership on May 30, in the manner set forth in the remedy section above, and refrain from collecting or requiring any withholding by the Employer until such time as Buzenius' resignation is acknowledged and an appropriate financial core membership service fee is established.

(c) Post at their business offices and local meeting halls copies of the attached notice marked "Appendix." [3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondents' representatives, shall be posted by Respondent Unions immediately upon receipt thereof in conspicuous places where notices to members are customarily posted, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that notices are not altered, defaced, or covered by any other material. Respondent Unions will also make additional signed copies of their notice available for the Employer to post with its own notice to ensure that nonmember employees are sufficiently apprised of their rights.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

No. 97-945

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED PAPERWORKERS INTERNATIONAL UNION AND UNITED PAPERWORKERS LOCAL UNION NO. 1033, PETITIONERS

v.

ROLAND BUZENIUS AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether a union-security clause in a collective bargaining agreement that requires employees to become and remain "members of the Union in good standing" as a condition of continued employment is facially violative of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), absent a concurrent definition in the agreement of "member in good standing."

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In the Supreme Court of the United States

OCTOBER TERM, 1997

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v.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 124 F.3d 788. The decision and order of the National Labor Relations Board (Pet. App. 14a-20a) and the decision of the administrative law judge (Pet. App. 23a-35a) are reported at 320 N.L.R.B. 349.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1997. The petition for a writ of certiorari was filed on December 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." That same paragraph, however, permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment." The paragraph further provides, however, that membership must be equally available to all employees on the same terms and conditions and may require employees to do no more than "tender the periodic dues and the initiation fees uniformly required."

This Court has held that, under that paragraph, " 'membership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). All that may be required as a condition of employment is "payment of initiation fees and monthly dues." *Ibid.* An employee may resign full union membership without suffering discharge and may not be discharged for failing to abide by union rules or policies with which he disagrees. *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 106 (1985). Finally, this Court has made clear that employees who are not union members need not pay fees or dues to the extent they "support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers* v. *Beck*, 487 U.S. 735, 745 (1988).

2. Petitioners, United Paperworkers International Union and its Local 1033 (Unions), are the exclusive bargaining representatives for a bargaining unit of the production and maintenance employees of Weyerhaeuser Paper Company (Company). The Unions and the Company entered into a collective bargaining agreement containing the following union-security clause:

> It is agreed that all employees who are members of the Union shall remain members of the Union in good standing. All new employees, who after the completion of thirty (30) days shall become and remain members in good standing as a condition of this employment.

Pet. App. 24a.

Roland Buzenius has worked for the Company for 15 years, was a member of the Unions, and served as president of Local 1033 in 1990 and 1991. Pet. App. 24a. By letters dated April 30, 1993, he resigned his membership in both the Local and the International and requested that the payments required of him under the union-security clause be reduced to reflect his right under *Beck* to object to supporting financially the Unions' activities unrelated to collective bargaining. *Id.* at 24a-25a. The Unions ignored Buzenius's letters, and dues continued to be deducted from his paycheck in the same amount as they had prior to his letters. Moreover, in November 1993, the Unions mailed Buzenius a new union-membership card. *Id.* at 3a, 25a.

3. Based on charges filed by Buzenius, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that the Unions had violated their duty of fair representation under

Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by failing to acknowledge Buzenius's resignation from full membership, and by failing to inform him and other employees of their rights under *General Motors* to refrain from full membership and under *Beck* to object to paying the costs of union activities unrelated to collective bargaining. Pet. App. 23a. The Board sustained the allegations of the complaint. *Id.* at 14a-19a.

The Board explained that, in *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), enforced *sub nom. International Ass'n of Machinists* v. *NLRB*, Nos. 96-1246, 96-2928 & 96-3467, 1998 WL 10595 (7th Cir. Jan. 14, 1998), issued the same day, the Board had ruled that a union violates its duty of fair representation by failing to provide notice of *Beck* rights to unit employees covered by a union-security agreement who are not members of the union. Pet. App. 15a. The Board further explained that, in so ruling, it had stated that, "in order to fully inform non-member employees of their *Beck* rights, a union must [also] tell them . . . of their *General Motors* rights to be and remain nonmembers." *Id.* at 15a-16a (quoting *California Saw*, 320 N.L.R.B. at 235 n.57).

Noting that the "complaint in the instant case alleges the unlawful failure to inform *all unit employees*, including those who are still members of the Union, of their rights under *Beck* and *General Motors*," the Board concluded that "the rationale of *California Saw* for concomitant notice of *Beck* and *General Motors* rights applies with no less force to those who are still full union members and who did not receive those notices before they became members." Pet. App. 16a. Accordingly, the Board ordered the Unions to honor Buzenius's resignation

from full membership, to refund excess deductions from his pay and reduce future deductions, and to notify all employees covered by the union-security clause of their rights to refrain from full union membership and to object to the payment of full union dues. *Id.* at 20a-22a, 34a-35a.

4. Buzenius sought review in the court of appeals of the Board's failure to order expunction from the collective bargaining agreement (CBA) of the union-security clause requiring employees to become and remain "members of the Union in good standing." Pet. App. 2a-4a.[1] The court agreed with Buzenius's contention that the clause is "facially invalid" because "the express language of this clause is inconsistent with [the] employees' right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities, and because the clause cannot be interpreted without resort to material outside of the CBA." *Id.* at 12a. Therefore, the court held that "the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." *Id.* at 12a-13a.

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[1] The parties did not raise, and the court of appeals did not discuss, whether the Board's failure to require expunction of the clause caused Buzenius injury-in-fact sufficient to give him standing to challenge the order in the court of appeals. Nor do we press that issue now, because, as we explain below, further review of this case is not warranted given the Board's decision to reconsider its position on whether clauses of the type Buzenius challenges here are in fact facially invalid and should be expunged.

ARGUMENT

Petitioners contend (Pet. 7-8) that the decision of the Sixth Circuit in this case is in accord with the decision of the Eighth Circuit in *Bloom* v. *NLRB*, 30 F.3d 1001 (1994), but conflicts with decisions of the District of Columbia, the Seventh, and the Ninth Circuits. See *International Union of Electronic Workers (I.U.E.)* v. *NLRB*, 41 F.3d 1532, 1538-1539 (D.C. Cir. 1994); *Nielsen* v. *International Ass'n of Machinists*, 94 F.3d 1107, 1113-1115 (7th Cir. 1996), cert. denied, 117 S. Ct. 1426 (1997); *Marquez* v. *Screen Actors Guild, Inc.*, 124 F.3d 1034, 1039 (9th Cir. 1997), petition for cert. pending, No. 97-1056. Petitioners further claim (Pet. 9) that the Sixth Circuit's decision "flies in the face of the plain language of [Section] 8(a)(3), that provision's legislative history and this Court's decisions construing that statutory language." Finally, petitioners argue that "the thousands of employers and unions, who for the last 40 years have negotiated union shop clauses in precisely the form provided by the NLRB,[2] are left in complete uncertainty as to the continued validity of their agreements," absent resolution of the issue. Pet. 7.

Even if there were some substance to petitioner's contentions, the petition should be denied, because the Board has decided to reconsider its position on the validity of clauses conditioning employment on union "membership" when the clauses are contained in collective bargaining agreements that do not spell out the limited membership obligations that can be

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[2] See *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 884 (1958).

compelled under the clauses. Because the Board's reconsideration may render obsolete any present disagreement among the courts of appeals and any attendant uncertainty created by that disagreement, resolution by this Court of the issue presented in this case is not warranted at this time.

Board Chairman Gould has indicated that he agrees with the Sixth Circuit's holding that union-security clauses requiring unit employees to become "members of the Union in good standing" are facially invalid. He has explained that, because "a union-security clause may lawfully compel only the payment of fees and dues related to representational activities," a "collective-bargaining agreement that speaks in terms of 'membership' or 'membership in good standing' without further definition misleads employees into believing that they can be terminated if they do not become formal, full-fledged union members" and pay "full dues." *Monson Trucking, Inc.*, 324 N.L.R.B. No. 149 (Oct. 31, 1997), slip op. 7 (Chairman Gould concurring);[3] see also *Internationl Bhd. of Teamsters, Local 443 (Connecticut Limousine Service, Inc.)*, 324 N.L.R.B. No. 105 (Oct. 2,

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[3] Chairman Gould added that "a union-security clause that requires 'membership' or 'membership in good standing' without concurrent definition of that term in the collective-bargaining agreement [also] undercuts and dilutes the notice which the Board established in *California Saw & Knife [Works,]*" 320 N.L.R.B. 224, 231-235 (1995), enforced *sub nom. International Ass'n of Machinists v. NLRB*, Nos. 96-1246, 96-2928 & 96-3467, 1978 WL 10595 (7th Cir. Jan. 14, 1988), for "[t]his notice is not adequate where the collective-bargaining agreement sends a contrary message and instruction to employees within the bargaining unit." *Monson Trucking, Inc.*, slip op. 7-8.

1997), slip op. 6 n.1 (Chairman Gould dissenting in part).

Although the other Board members have not yet reached a decision on the issue, they have agreed that reconsideration of the Board's former position is warranted. Accordingly, the Board has authorized its General Counsel to seek a remand of cases pending decision in the courts of appeals that present the issue of the facial validity of union-security clauses requiring employees to become and remain "members of the union in good standing" as a condition of continued employment.[4]

The Board's reconsideration of its position on the issue in this case may well lead to resolution of the conflict in the courts of appeals, a conflict that petitioners overstate in any event.[5] The Board is

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[4] Motions for remand were filed in *Bloom* v. *NLRB*, No. 97-1582 (8th Cir.); *Orce* v. *NLRB*, No. 97-4038 (2d Cir.); and *Cecil* v. *NLRB*, No. 97-5302 (6th Cir.). The Eighth Circuit has granted the Board 90 days in which to reconsider its decision in *Bloom*. The Second Circuit denied a remand in *Orce*, but, after hearing oral argument, entered, on December 9, 1997, a summary order dismissing as moot Orce's petition for review. The Sixth Circuit has not acted on the motion for remand in *Cecil*. The Board does not seek remand in the present case because the court of appeals has already issued a decision.

[5] The decision by the court of appeals in this case does conflict with the decisions of the D.C. Circuit in *I.U.E.*, *supra*, and the Seventh Circuit in *Nielsen*, *supra*. Neither the Eighth Circuit in *Bloom* v. *NLRB*, 30 F.3d 1001 (1994), however, nor the Ninth Circuit in *Marquez*, *supra*, decided the precise issue presented here—whether a clause requiring employees to become "members of the Union in good standing" is facially unlawful absent further definition of the relevant terms. The Eighth Circuit ruled that a similar clause should have been expunged "[b]ecause the overly broad union security clause was

entitled to "considerable deference" in its interpretation of the Act. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Accord *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987). The courts must defer to the Board's construction of the Act if its interpretation is "reasonable" even if the courts would interpret the statute differently. *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 114 (1985) (citing *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979)); *International Ass'n of Machinists* v. *NLRB*, Nos. 96-1246, 96-2928 & 96-3467, 1998 WL 10595, at *7 (7th Cir. Jan. 14, 1998). The deference due the Board is not defeated because the Board changes its position. See *Curtin Matheson*, 494 U.S. at 787 (citing *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975), and *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978)).

Both courts of appeals decisions that conflict with the decision in this case rested in part on deference to the Board's prior position that union security clauses of the type challenged here are not facially invalid. See *I.U.E.*, 41 F.3d at 1536 (noting that the NLRB found that the challenged clause was not facially invalid and later noting deference due the Board's decision); *Nielsen*, 94 F.3d at 1114-1115 (relying in part on the position of the NLRB and its General

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unlawfully interpreted and applied" but did not find that the clause was "facially invalid." See *Bloom*, 30 F.3d at 1005. The Ninth Circuit held that a union did not violate its duty of fair representation by negotiating a clause of the type challenged here, and, although it relied on *I.U.E.* and *Nielsen*, the court of appeals did not expressly rule on the facial validity of the clause. See *Marquez*, 124 F.3d at 1039.

Counsel in holding the challenged union security clause to be facially valid). If a majority of the Board were to agree with Chairman Gould and change the Board's position to accord with the holding of the Sixth Circuit in this case, the other courts of appeals would likely uphold that interpretation of the Act.

The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). Because of the complex and competing interests involved, the Board generally has exclusive jurisdiction in the first instance to interpret Section 8 of the Act. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). And, if a reviewing court finds the Board's interpretation unjustifiable, the court should generally remand to the Board to allow it to reconsider the interpretation in the first instance. See *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974). The concerns undergirding those principles also suggest that, when the Board has clearly indicated its intention to reconsider its interpretation of the Act, this Court should await the Board's reconsideration before rendering a definitive interpretation. Accordingly, it would be premature in the present circumstances for the Court to undertake to resolve the question that the petition for certiorari presents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED PAPERWORKERS INTERNATIONAL UNION and
UNITED PAPERWORKERS LOCAL UNION NO. 1033,

Petitioners,

v.

ROLAND BUZENIUS
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT ROLAND BUZENIUS' MEMORANDUM IN RESPONSE TO THE PETITION

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January 1998

QUESTION PRESENTED

Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union," even though that requirement cannot lawfully be enforced literally as a condition of employment?

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IN THE

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OCTOBER TERM, 1997

No. 97-945

UNITED PAPERWORKERS INTERNATIONAL UNION and
UNITED PAPERWORKERS LOCAL UNION NO. 1033,

Petitioners,

v.

ROLAND BUZENIUS
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

RESPONDENT ROLAND BUZENIUS' MEMORANDUM IN RESPONSE TO THE PETITION

Respondent Roland Buzenius respectfully submits this Memorandum in response to the Petition of United Paperworkers International Union and United Paperworkers Local Union No. 1033 (hereinafter "Unions" or "Paperworkers"). Respondent Buzenius urges that the Court grant certiorari on the issue presented by Petitioners, but not in this case. Instead, this Court should deny the Petition in the case and grant the Petition in *Marquez v. Screen Actors Guild*, 124 F.3d 1034 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056), or, in the alternative, should grant the petitions in both this case and *Marquez* and summarily affirm in this case or consider them together.

STATEMENT OF THE CASE

This case involves the construction of section 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158 (a)(3) (1988), insofar as it authorizes compulsory unionism requirements in collective bargaining agreements.

I. The Facts.

The Unions have a collective bargaining agreement with Weyerhaeuser Paper Company which contains a union security clause (Article 2, Section 2) that requires bargaining unit employees to become and remain members in good standing of the Unions, as a condition of employment. That clause states:

> It is agreed that all employees who are members of the Union shall remain members of the Union in good standing. All new employees, who after the completion of thirty (30) days shall become and remain members in good standing as a condition of this employment.

(Pet. App. at 24a.)

Roland Buzenius was a member of the Unions and an employee of Weyerhaeuser. On April 30, 1993, Buzenius sent letters to both the International and the Local resigning from the Unions. In those letters, he also asserted his right under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to financially supporting the Unions' non-collective bargaining activities. (Pet. App. at 24a-25a.)

However, even after Buzenius resigned from the Unions, the Unions continued to treat him as a union member. They did not acknowledge Buzenius' resignation. (*Id.* at 25a.) Instead, the International sent him a new membership card. Additionally, the Unions never informed Buzenius of his right to pay only a reduced "financial core" fee, the amount of that fee, or any of his *Beck* rights. They failed to provide any information about the financial core fee. In the words of the Administrative Law Judge

who heard this case, the Unions "merely stonewalled." (*Id.* at 28a.)

II. Proceedings Below.

On June 23, 1993, Buzenius filed unfair labor practice charges against the Unions with the National Labor Relations Board ("NLRB"). (Pet. App. at 23a.) The NLRB's General Counsel issued a complaint against the Unions for violating Buzenius' right to pay a reduced fee and for failing to inform bargaining unit employees about their rights to refrain from union membership and pay a reduced fee in lieu of union dues. (*Id.*)

Following a trial, the Administrative Law Judge, on March 25, 1994, ruled that the compulsory unionism language was not *per se* unlawful, but that the Unions breached their duty of fair representation, in violation of section 8(b)(1)(A) of the Act, by failing to advise Buzenius and other unit employees of their rights to refrain from union membership and pay a reduced fee in lieu of union dues. The Judge required the Unions to notify each unit employee of his *Beck* rights. (Pet. App. at 32a-33a.). On December 20, 1995, the Board affirmed the Judge's order and required the Respondents to notify all bargaining unit employees of their rights under *Beck* and *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). (Pet. App. at 15a-19a.) The Board refused Buzenius' request that it order the Unions to expunge or modify the union security clause. (*Id.* at 3a.)

Buzenius timely appealed. The United States Court of Appeals for the Sixth Circuit held that the union security agreement requiring union membership was facially invalid and that the Board's refusal to order expungement of the unlawful language from the agreement was an abuse of its discretion. (*Id.* at 12a-13a.)

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Decision Was Clearly Correct Under This Court's Controlling Holdings in *General Motors* and *Beck*.

The issue raised in the Paperworker's Petition, as restated by this Memorandum, is whether a union breaches its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union," even though that requirement cannot lawfully be enforced literally as a condition of employment. The Sixth Circuit held that:

> [b]ecause the express language of this clause is inconsistent with employees' right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities, and because the clause cannot be interpreted without resort to material outside of the CBA, . . . the clause is facially invalid.

(Pet. App. at 12a.)

The court found that "the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." (Pet. App. at 12a-13a.) "To permit the CBA to say what it cannot literally mean does violence to the Act's policy of voluntary unionism and to principles of contract interpretation." (*Id.* at 10a.)

The Unions' Petition to review this decision should be denied, because the Court of Appeals was clearly correct under this Court's definitive prior interpretations of NLRA section 8(a)(3).

On its face, section 8(a)(3) *appears* to permit unions and employers to negotiate union security clauses which require

employees to acquire and retain "membership" in the union. However, the Court has noted that "[a]fter a statute has been construed . . . by this Court . . . it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J. concurring and dissenting in part). Thus, section 8(a)(3) of the Act includes the limitations placed on it by this Court.

What limitations has the Court placed on union security clauses authorized by section 8(a)(3) of the NLRA? The Court spent decades "whittling down" these "requirements" and, in the process, dramatically altered the actual meaning and effect of section (8)(a)(3). First, in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), the Court held that the maximum obligation that could be forced upon an employee under a union security clause is the payment of "union dues." Notwithstanding the language of section 8(a)(3) purporting to permit a "membership" requirement, the Court held that "'[m]embership' as a condition of employment is whittled down to its financial core." *Id.* at 742; *see also Radio Officers' Union v. NLRB*, 347 U.S. 17, 40-41 (1954) (union security agreements cannot be used "for any purpose other than to compel payment of union dues and fees").

Second, in *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985), the Court further limited the compulsory unionism provisions of the NLRA by holding that a union member could resign his membership at will because "voluntary unionism" is a core policy of the NLRA. *Id.* at 104-05 ("restrictions on the right to resign [are] inconsistent with the policy of voluntary unionism implicit in § 8(a)(3)"). Most significantly, the Court in *Pattern Makers'* stated foursquare that "[f]ull union membership thus no longer can be a requirement of employment." 473 U.S. at 106.

Finally, in *Communications Workers v. Beck*, 487 U.S. 735 (1988), the Court ruled that the "whittled down" obligation to pay full union dues, as enunciated in *General Motors*, must be "whittled down" even further, so that employees' actual obligation is not the payment of full union dues but merely the payment of a reduced representational fee. *Beck* held that section 8(a)(3)

cannot be interpreted to require employees to pay "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." To the contrary, the Court held that, notwithstanding section 8(a)(3)'s explicit language, the statute "authorizes the exaction of only those fees necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Beck*, 487 U.S. at 762-63.

Beck reaffirms the conclusion that the NLRA's policy is "voluntary unionism," *id.* at 755; *Pattern Makers'*, 473 U.S. at 104-05, 107, 114. In applying that policy to "union security" provisions negotiated under the Act, the Court found that Congress understood the Act to "provide only the most grudging authorization of such agreements." *Beck*, 487 U.S. at 755. *Beck* conclusively establishes that section 8(a)(3) prohibits a union from requiring, as a condition of employment, "membership" and the forced payment of dues in excess of the cost of representational activities.

In short, the Court's precedents unequivocally hold that employees working under a union security clause need not join a union or even pay full union dues. Rather, at most, they are only obligated to pay a reduced "representation fee." *See General Motors, Pattern Makers'* and *Beck*. Requiring more than the minimal *Beck* payment of a fee is *per se* unlawful. Requiring full union membership—which is precisely what the Paperworkers' agreement requires here—is beyond the pale.

In a similar case, the Eighth Circuit in *Bloom v. NLRB*, 30 F.3d 1001 (1994) found that a nearly identical clause was inherently misleading and unlawful. The Eighth Circuit overturned the Board's refusal to expunge a similar clause, stating:

> Although a union security clause cannot be used as "an instrumentality for the indirect enforcement of nonfinancial union regulations," *Local 54, Hotel Employees & Restaurant Employees Int'l Union (Atlantis Casino Hotel)*, 291 N.L.R.B. 989, 992 (1988), the clause at issue in this case, specifically the "member in

> good standing" language, implies otherwise. An employee who is unfamiliar with the Supreme Court cases discussing union security provisions is likely to conclude that the clause requires exactly what it says —"[membership] in good standing in the Union." We fail to see how an employee can discern from such language that he cannot be terminated if he does not wish to become a formal, full-fledged union member burdened with all of the obligations of union membership and subject to the full reach of the union's disciplinary measures.

Bloom, 30 F.3d at 1004.

Another recent case involving this issue is *Schreier v. Beverly California Corp.*, 892 F. Supp. 225 (D. Minn. 1995). In that case, a district court read *Beck* and *Bloom* to invalidate all union security clauses which overstate the limited representation fee obligation permitted by *Beck*. The clause in *Schreier* did not even require membership, but only required "the payment of a standard initiation fee and standard regular monthly dues, all as applies uniformly to all members of the union in the bargaining unit." The *Schreier* court held that:

> The union security clause is facially invalid under section 8 of the National Labor Relations Act (29 U.S.C. § 158) because it requires more from the plaintiff than can be required under the *Beck* and the *Bloom* cases.
>
> * * *
>
> The union security clause itself is unlawful and has the clear capacity to mislead employees.

892 F. Supp. at 226-27.

In another case involving a challenge to the language of a collective bargaining agreement, the Court of Appeals for the Seventh Circuit stated:

> nothing we have said has been intended to suggest that unions and employers have a privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either ***by itself*** or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

Wegscheid v. Auto Workers Local 2911, 117 F.3d 986, 991 (7th Cir. 1997) (emphasis added).

Under *ALPA v. O'Neill*, 499 U.S. 65, 79-80 (1991), the legality of the unions' negotiation of its forced membership clause must be weighed against the "legal landscape at the time." Eight years after *Beck*, the "legal landscape" limiting section 8(a)(3) to the payment of only reduced representational fees is clear, as the court of appeals recognized in this case, *Bloom*, and *Wegscheid*. The *Beck* limitations have been effectively written into section 8(a)(3), and it is against that clear "legal landscape" that union security clauses must be judged.

Why do unions put language into collective bargaining agreements that require union membership? As the *Wegscheid* court stated, "the only realistic explanation for the retention of the statutory language in collective bargaining agreements [requiring union membership] . . . is to mislead employees about their right not to join the union." 117 F.3d at 990.

The mere negotiation of the clause in this case is a grotesque violation of the policy of "voluntary unionism" embedded in the Act. *See Pattern Makers'*, 473 U.S. at 107. That policy is negated when a contract affirmatively misleads employees into believing that they will be discharged for failing to become formal union members. Hence, language in a collective bargaining agreement requiring union membership is *per se* facially invalid. Conveying to employees false and fraudulent information about

their union security obligations constitutes a violation of the duty of fair representation and section 8(b)(1)(A).

A collective bargaining agreement controls the employees' obligations vis-a-vis their union and employer under the contract—including their obligations under a union security clause. Words have meaning and the plain language of the union security clause requires that each bargaining unit employee "be a member" of the union. "Membership" language—like that found in the contract here—overstates the limited obligation that employees can be required to undertake under *General Motors* and *Beck*, and misleads employees about the true extent of their obligations. A union security clause that requires union membership is subject to only one interpretation: "join the union, or be fired"! The decision of the U.S. Court of Appeals for the Sixth Circuit was clearly correct, and the Petition for Certiorari should be denied.

II. The Court Should Grant Certiorari on the Issue Petitioners Present, But Not Here. Instead, the Court Should Deny This Petition and Grant the Petition in *Marquez* or, Alternatively, Grant Both the Paperworkers' Petition and the *Marquez* Petition and Summarily Affirm in This Case or Consider the Cases Together.

On December 29, 1997, a petition for certiorari filed by Naomi Marquez was docketed that raises the identical issue presented in this case: "Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be 'a member of the Union' . . . , even though th[at] requirement[] cannot be enforced literally as a condition of employment?" Petition for Certiorari at i, Question I, *Marquez v. Screen Actors Guild*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056).

As discussed below, there is, surprisingly in light of *General Motors* and *Beck*, a conflict in the circuits, and the issue in this case is important. However, this is not the best case for the Court

to review. In this case, the collective bargaining agreement simply requires "union membership." In *Marquez*, the agreement requires "union membership" and also defines membership as the payment of full union dues. *Marquez*, 124 F.3d at 1036. The facial validity of union security agreements that require union membership and the payment of full dues thus is presented more completely in *Marquez*. Therefore, the Court should deny certiorari in this case and grant the petition for certiorari in *Marquez*. In the alternative, the Court should grant certiorari in both *Marquez* and this case and summarily affirm in this case or consider them together.

A. There Is a Widespread Conflict Among the Circuits, and Within the NLRB, as to Whether NLRA Section 8(a)(3) Permits Agreements That Purport to Require "Membership" and Payment of Full Dues, Although That Section, as Definitively Interpreted by This Court, Prohibits Enforcement of Those Requirements.

In addition to the Sixth Circuit's decision in this case, four other courts of appeals have faced this issue. The Eighth Circuit was the first to issue an opinion on this question, *Bloom v. NLRB*, 30 F.3d 1001 (1994). In *Bloom*, it reversed a NLRB-approved settlement agreement requiring a union and employer:

> to post notices informing employees that they would "no longer give effect to the provision in [the] contract . . . that requires employees become and remain 'members in good standing' as a condition of continued employment unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees."

Id. at 1002, 1004 (alteration in original).

This notice was "not sufficient to protect [the] employees' . . . right to refrain from union activities," the court ruled, because, under *Beck*, employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation

fees, as the above notice seems to imply." *Bloom*, 30 F.3d at 1004-05.

Bloom concluded that "an adequate remedy . . . requires expunction of the offending clause" from the collective bargaining agreement. *Id.* at 1005. A district court later recognized that a compulsory unionism clause that does not say that an employee's only obligation is to pay for collective bargaining costs is "facially invalid." *See Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 226-27 (D. Minn. 1995).

Two other circuits, the District of Columbia and the Ninth Circuit, take the opposite position. *See Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994)[1] and *Marquez v. Screen Actors Guild*, 124 F.3d 1034 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056). And, there is a conflict on this issue between the decisions of two different panels of a fourth court of appeals, the Seventh Circuit. *Compare Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997) *with Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996).

In *Nielsen*, the court "agree[d] with the D.C. Circuit . . . that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses" that require the payment of union dues without "not[ing] that employees [are] only obligated to pay for core representational activities." 94 F.3d at 1113-15.

Later, in *Wegscheid*, another panel of the Seventh Circuit indicated that it would have reached a result contrary to *Nielsen*

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[1]It is unclear whether the District of Columbia Circuit would take the same position as to compulsory unionism provisions negotiated after *Electronic Workers*. The court there said that the NLRB was "free to reconsider its . . . policy in light of evolving Supreme Court precedent and to conclude that, in the future, unions will be found guilty of a duty-of-fair-representation violation if they adopt 'ambiguous' union-security provisions . . . without apprising employees of their rights under such provisions." 41 F.3d at 1538.

in an appropriate case. *Wegscheid* was an employees' suit alleging that their exclusive bargaining agent breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that did "not advise the employees of their right (announced in *Beck*) not to join the union and instead to pay only an agency fee." 117 F.3d at 988. The court held that the facial challenge to the provision was "moot," because a settlement of the enforcement count of the complaint gave the plaintiffs "all the relief that *they* need to protect themselves against being misled" by "the objectionable language in the collective bargaining agreement." *Id.* at 990.

This widespread conflict among, and within, the Circuits concerning the facial validity of compulsory unionism provisions requiring full membership and/or payment of full dues is aggravated by a split within the NLRB over the same issue. In *Electronic Workers Local 444 (Paramax Systems Corp.)*, the Board held that a "union-security clause requiring that employees become and remain 'members of the Union in good standing'" was not facially unlawful. 311 N.L.R.B. 1031, 1033 & n.6 (1993), *petition for review denied in pertinent part*, 41 F.3d 1532 (D.C. Cir. 1994).[2] However, later, in *Teamsters Local 443 (Connecticut Limousine Service)*, the Board's current Chairman announced that he "agree[s] with the Sixth Circuit's recent decision in *Buzenius* that union-security clauses containing [language requiring employees to become 'members of the Union in good standing'] are facially invalid." 324 N.L.R.B. No. 105, slip op. at 6 n.1 (Oct. 2, 1997) (Gould, Chairman, dissenting in part) (citation omitted); *accord Monson Trucking, Inc.*, 324 N.L.R.B. No. 149, slip op. at 6 (Oct. 31, 1997) (Gould, Chairman, concurring).

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[2]The Board instead found the clause "ambiguous," and concluded that the unions' "failure to clarify the ambiguity constituted a breach of their duty of fair representation." *Electronic Workers Local 444*, 311 N.L.R.B. at 1033 n.6.

B. The Importance of the Issue.

This question manifestly is important, both in principle and in practice, as this Court previously recognized by granting certiorari in cases such as *Beck*.

It is important in principle, because a requirement that employees join or pay full union dues as a condition of employment impairs employees' rights to refrain from "union membership," rights explicitly guaranteed in section 7 of the National Labor Relations Act, 29 U.S.C. § 157, and a fundamental congressional policy imbedded in the Act.

Whether NLRA section 8(a)(3) permits agreements that say that "membership" and payment of full dues are required, although that section as definitively interpreted by this Court prohibits enforcement of those requirements, is important in practice for two reasons. First, the Court's resolution of this question will affect a large number of such agreements. (*See* Pet. at 5-6.)

Second, this Court's intervention is necessary to establish conclusively nationwide that employers and unions cannot lawfully mislead employees about their obligations in a "union-security" agreement. As NLRB Chairman Gould also has explained, "[g]enerally speaking, neither workers nor employers understand that 'membership' is what the Supreme Court has defined it to be in its 1963 *General Motors* holding." Gould, *supra*, at 3; *see Electronic Workers Local 444*, 311 N.L.R.B. at 1037; Harry H. Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1057-58 (1976).

C. The Entire Issue of the Validity of Compulsory Unionism Provisions in Collective Bargaining Agreements Is More Completely Presented in *Marquez* Than in This Case.

The *Marquez* case, rather than this case, more concretely presents the entire issue of the facial validity of compulsory

unionism provisions that do not limit the obligations stated to those that can lawfully be enforced as a condition of employment.

The compulsory unionism provision in *this case* only says that employees "'shall become and remain members of the Union in good standing as a condition of employment.'" It does not define "membership in good standing." (Pet. App. at 6a-7a.) Thus, although the Sixth Circuit held that to be valid a "union-security clause" must define its requirement as only that employees "pay that portion of dues related to core representational activities," Pet. App. at 12a, this Court could find that clause facially invalid simply because it requires more than the payment of dues and initiation fees without deciding whether the *Beck* rights must be spelled out in the contract. The latter question cannot be avoided in *Marquez*, because the provision involved there requires every performer ***both*** "to be 'a member of the Union in good standing' ***and*** to pay periodic dues and initiation fees," *Marquez*, 124 F.3d at 1036 (emphasis added).

CONCLUSION

This case presents issues that have great significance to the respective rights of individual employees, unions and employers under the NLRA. There are direct conflicts between the decisions of different courts of appeals on all questions presented, including a widespread conflict among several courts of appeals on the question of the facial validity of compulsory unionism provisions that purport to require employee obligations that cannot lawfully be enforced. However, the decision of the Sixth Circuit in this case is clearly correct under this Court's decisions in *General Motors* and *Beck*. Moreover, the *Marquez* case presents the issue of the validity of compulsory unionism language more completely than does this case. Therefore, the Court should either grant certiorari only in *Marquez*, and deny it or summarily affirm

in this case, or grant certiorari in both cases and consider them together.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED PAPERWORKERS INTERNATIONAL UNION, and
UNITED PAPERWORKERS LOCAL UNION NO. 1033,
Petitioners,

v.

ROLAND BUZENIUS

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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STATUTE

29 U.S.C. § 158(a)(3)	*passim*

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE NATIONAL LABOR RELATIONS BOARD'S BRIEF IN OPPOSITION

The National Labor Relations Board in opposing our *certiorari* petition does not contest any of the "reasons for granting the writ" we set out in the petition. Instead, the Board claims that "resolution by this Court of the issue presented in this case is not warranted at this time" because the Board "has decided to reconsider its position" on the question presented here and the Board's reconsideration "may render obsolete any present disagreement among the court of appeals and any attendant uncertainty created by that disagreement." NLRB Br. in Op. pp. 6-7;

see also *id.* at pp. 9-10 (consideration of the question presented "would be premature in the present circumstances").

The Board's tacit admissions confirm that *certiorari* should be granted and its plea to put off to another day the necessary—and now all-but-inevitable—review in this Court of the question presented is unconvincing from beginning to end.

1. The argument in the Board's opposition brief begins by succinctly summarizing the petition's "reasons for granting the writ":

> Petitioners contend (Pet. 7-8) that the decision of the Sixth Circuit in this case is in accord with a decision of the Eighth Circuit . . . but conflicts with decisions of the District of Columbia, the Seventh, and the Ninth Circuits. [Citations omitted]. Petitioners further claim (Pet. 9) that the Sixth Circuit's decision "flies in the face of the plain language of [Section] 8(a)(3), that provision's legislative history and this Court's decisions construing that statutory language." Finally, petitioners argue that "the thousands of employers and unions, who for the last 40 years have negotiated union shop clauses in precisely the form provided by the NLRB, are left in complete uncertainty as to the continued validity of their agreements," absent resolution of the issue. Pet. 7. [NLRB Br. in Op. p. 6; footnote omitted.]

As to our conflict point, the Board goes on to *agree* that there is in fact a square conflict between the Sixth Circuit on the one hand and the D.C. and Seventh Circuits on the other. NLRB Br. in Op. p. 8, n.5. Moreover, as we show in the margin, the Board's effort to dispute our showing that the Eighth Circuit is aligned with the Sixth Circuit in this regard and that the Ninth Circuit is aligned with the D.C. and Seventh Circuits is strained in the extreme.[1]

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[1] The Board's brief in opposition, at p. 8 n.5, states that *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), is not properly aligned with

Equally to the point, the Board does not offer a word of rebuttal to our demonstration that the decision below is wrong as a matter of law and that the resulting circuit conflict has the most deleterious effect on the practice and procedure of collective bargaining—preferring instead the safety of a discrete silence.

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the decision below and that *Marquez v. Screen Actors Guild, Inc.*, 124 F.3d 1934 (9th Cir. 1997), pet. for cert. pending, No. 97-1056, is not properly aligned with *IUE v. NLRB*, 41 F.2d 1532 (D.C. Cir. 1994) and *Nielsen v. IAM*, 94 F.3d 1107 (7th Cir. 1996). According to the Board that is so because neither *Bloom* nor *Marquez* decided the "precise issue here—whether a clause requiring employees to become members of the union in good standing is facially unlawful absent further definition of the relevant terms." That pushes the word "precise" beyond its limits.

The court below, while recognizing that *Bloom* did arise in a distinguishable context, stated that *Bloom* provided "considerable insight" into the issue at hand, quoted from and analyzed the *Bloom* opinion at length, and cited *Schreier v. Beverly California Corp.*, 892 F. Supp. 225 (D. Minn. 1995) as "applying *Bloom*" to support its ruling that "the [standard form] union security clause itself is unlawful." See Pet. App. 7a-9a. And, the court below did so to provide prior authority for *its* ruling that standard form "membership" union security clauses are invalid on their face. At the very least, then, *Bloom* is the precursor of, and the foundation for, the instant Sixth Circuit decision.

As to *Marquez*, the Board's brief in opposition, at p. 9, n.5, states that the "Ninth Circuit held that a union did not violate its duty of fair representation by negotiating a clause of the type challenged here, and although it relied on *IUE* and *Nielsen*, the court of appeals did not expressly rule on the facial validity of the clause." But *IUE*, *Nielsen* and *Marquez* all address claims that the union breached its duty of fair representation by negotiating a standard form "membership" union security clause that is allegedly invalid on its face in not spelling out the NLRA meaning of "membership"—and all three reject that claim on the ground that such clauses are validated by the first proviso to NLRA § 8(a)(3). The *Marquez* opinion states that the "NLRA by its very terms allows the inclusion of a union security term requiring union 'membership'," and then adds "two of our sister circuits have recently rejected claims from plaintiffs . . . like *Marquez* . . . [and have] held that terms requiring union membership continue to be permissible under federal law." 124 F.3d at 1038.

2. What the Board does do, as we have noted, is claim that the Agency, by reconsidering its long-standing, consistent position on the legal question presented here, can reach a new level of understanding that will still the present discord and that will facilitate—rather than exacerbate the present disruption of—the collective bargaining process. The hard realities belie that utopian vision.

(a) The "precise question at issue" here—and the question the Board has been spurred by the conflict in the circuits to reconsider—is, we submit, a question to which "Congress has directly spoken," and not a question as to which "the statute is silent or ambiguous." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Thus, the question here is one that in the final analysis is to be answered by the courts, "employing traditional tools of statutory construction," not one which turns on whether the agency's answer is based on a permissible construction of the statute." *Id.*

The first proviso to NLRA § 8(a)(3) states unequivocally:

> Nothing in this Act or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . . [29 U.S.C. § 158(a)(3).]

Thus, as this Court has observed, "agreements *requiring* '*membership*' in a labor union . . . are *expressly permitted* by the [first] proviso" to § 8(a)(3).[2] *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963) (emphasis added).

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[2] As we develop in our petition, the decision to proceed in the way § 8(a)(3) does—*viz.* through the first proviso to specify a lawful union security clause using "membership" as a term of art and through the other § 8(a)(3) provisos to place limits on the clause's enforcement without requiring that those limits be spelled out in

To be sure, the court below rejected the proposition that NLRA § 8(a)(3) means what it says and held that union security clauses phrased in the very statutory language of § 8(a)(3)—or in language that has been recognized for over 40 years as synonymous—rather than being "expressly permitted," are *invalid* on their face (because that statutory language, standing alone, does not clearly spell out the covered employees' rights and obligations).

But the statutory materials show: that the precise question presented here is one squarely governed by the NLRA as a matter of law; that the Sixth Circuit's construction of the § 8(a)(3) proviso is wrong as a matter of law; and that the court of appeals' construction of § 8(a)(3) would continue to be wrong as a matter of law if the Board, in reconsidering its long-standing (contrary) construction of § 8(a)(3), were to adopt the Sixth Circuit's position as the Board's own.

The NLRA for the most part is framed in broad general commands. It follows from that, as the Board's brief in opposition, at pp. 8-10, stresses, that the Agency in interpreting those commands is "entitled to 'considerable deference' in its interpretation of the Act." That is *not* true here. The first proviso to § 8(a)(3) deals with a discrete issue in specific terms. And, the limiting principle on judicial deference to an agency construction of its stat-

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the clause—represents a careful policy judgment in favor of maintaining industrial stability and of facilitating collective bargaining.

Thus, contrary to the Sixth Circuit's supposition, it was not the intent of Congress that a union security clause serve as a form of employee notice; rather as the words of the first proviso to § 8(a)(3) make clear, Congress intended that a union shop clause would serve the same office as the other terms of a collective bargaining agreement—the office of setting the rights and obligations of the parties to the contract, *viz.*, the employer and the union. And, of course, a clause that uses the formulation approved by Congress is obviously capable of lawful application and enforcement, and therefore, passes the test of legality that Congress set out in § 8(a)(3). *See* Pet. 9-10.

ute is that where "a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A.*, 467 U.S. at 843, n.9.

The sum of the matter is this. This case presents the purest possible question of statutory construction entrusted to the courts and one that has great practical import. It is supremely unlikely that Board reconsideration of the question and a *reaffirmation* of its present position would move the Sixth Circuit or the Eighth Circuit. And, given how contrary to the Act's plain language, its structure and the legislative history, the Sixth Circuit ruling here is, it is equally unlikely that the Board's acquiescence to that ruling would move the D.C. Circuit, the Seventh Circuit or the Ninth Circuit from their present position contrary to that of the decision below. That being so, for all the reasons stated in our petition, the time for this Court's review has come.

(b) We would be remiss if we failed to add two points of clarification.

First, nothing we have said is meant to imply that the Board should not have every opportunity to reconsider its position on the proper construction of NLRA § 8(a)(3) and its provisos and to do so in a manner and at a time that enables the Board to provide this Court with its present position prior to any decision by the Court on the question presented. We have no quarrel with the poposition that no matter how pure a question of statutory construction may be, the position of the agency entrusted with administering the statute, while not entitled to deference, is entitled to consideration and respect by the courts.

But there is no reason to believe that granting *certiorari* here will pretermit—or even inconvenience—such a reconsideration in this instance. The Board has already issued a decision in *Group Health Inc. and Gary Bloom*, 325 NLRB No. 49 (Jan. 30, 1998), one of the cases in

which the Board sought a court of appeals remand in order to reconsider its position on the question presented here, albeit without issuing a majority decision on that question. And, the Board has, as we understand it, other cases on this question under advisement.[3] Moreover, after stating its position on reconsideration in such a case the Board can then align itself either with petitioner or with respondent herein in the briefing and arguing of this case.

Second, as the three Board opinions in the Agency's third and latest *Bloom* decision indicate, the present adverse effects on the collective bargaining system noted in our *certiorari* petition, at pp. 5-7, are only the visible tip of the iceburg.

Bloom is a case in which the Board was called on to evaluate the propriety of a settlement agreement, pursuant to which the union and employer had negotiated a union security clause defining "membership," and three Board members limited themselves to that task. 323 NLRB No. 49, sl. op. pp. 1-4. But Chairman Gould, in a concurring opinion, reached the question presented here, concluded 'that union-security clauses requiring that an employee be a "member" of those terms are facially invalid," 323 NLRB No. 49, sl. op. p. 7, and "propos[ed] . . . a model union-security" that he would regard as valid on its face, *id.* at 6. Member Brame, in a dissenting opinion, agreed with Chairman Gould on the invalidity of all standard form "membership" union security clauses but parted ways with the Chairman on what is a valid clause. Despite what § 8(a)(3)'s first proviso says—that "[n]othing . . . precludes . . . an agreement . . . to require . . . [union] membership"—Member Brame concluded that any clause using the statutory language—even amplified with a definition of the statutory terms—is *invalid per se*. 325 NLRB No. 49 sl. op. pp. 7-9.

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[3] As we explained in the Petition, pp. 6-7 & n. 2, the Eighth Circuit allowed the Board ninety days in which to reconsider the Board's second decision in *Bloom*.

Plainly then, the process of implementing the Sixth Circuit's ruling here, if that is what the Board were to determine to do, is not a process that is going to run smoothly and surely. And, in the meantime, the thousands of parties to collective bargaining agreements containing standard form "membership" union security agreements would be without any authoritative legal guidance.

Moreover, even if the Board and the reviewing courts of appeals were to come to a consensus on the language of a model union security clause, they cannot, by a wave of the hand, insert that clause into agreements. The NLRA creates a system of free collective bargaining. Employers have the right to refuse to agree to changes in a collective bargaining agreement or to demand still other changes in exchange.

Thus, at the very least, adoption of the Sixth Circuit's ruling here on the NLRA law promises a period of collective bargaining conflict and instability. That, of course is precisely what Congress sought to prevent by permitting the traditional contract formulation signifying a lawful union security agreement that the legislature wrote into NLRA § 8(a)(3)'s first proviso.

II. MR. BUZENIUS' MEMORANDUM IN RESPONSE TO THE PETITION

Mr. Buzenius, the charging party before the NLRB who initiated this case, and a respondent in this Court, takes the position that

> the Court [should] grant certiorari on the issue presented by Petitioners, but not in this case. Indeed, this Court should deny the Petition in the case and grant the Petition in *Marquez v. Screen Actors Guild*, 124 F.3d 1034 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056), or, in the alternative, should grant the petitions in both this case and *Marquez* and summarily affirm in this case or consider them together. [Buzenius Mem. p. 1.]

For the purposes of these jurisdictional papers we believe that the following three responsive points suffice.

1. Mr. Buzenius recognizes both that there is a "widespread conflict among the circuits" on the question presented here, Buzenius Mem. pp. 10-12, and that this "question manifestly is important, both in principle and in practice," *id.* at 13.

2. Mr. Buzenius' claim that the "*Marquez* case, rather than this case, more concretely presents" that question, Buzenius Mem. pp. 13-14, is without substance. The reverse is true.

This case concerns the facial validity of a standard form "membership" union security clause of the kind found in thousands of collective bargaining agreements; the *Marquez* clause, in contrast, is *sui generis* insofar as it puts a gloss on the term "membership in good standing." *See* 124 F.3d at 1038 & n.2 (setting out the original and modified union security clauses in that case).[4]

This case has run its course and comes to the Court from a true final judgment. *Marquez*, in contrast, is at an interlocutory stage since the Ninth Circuit remanded there for district court consideration of two issues in factual dispute : whether the union breached its fair representation duty in enforcing the union security agreement by advising Ms. Marquez that she was required to join the union rather than that she had to meet her union financial obligation, and whether the union had an adequate system for notifying nonmember employees covered by a union security agreement of their right to object and pay only the collective bargaining portion of the normal union dues/agency fee amount. See 124 F.3d at 1041-43.

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[4] Given the Ninth Circuit's ruling that the original union security clause in *Marquez* was facially lawful without any definition of the phrase "member of the Union in good standing," the court of appeals did not consider whether the clause as modified during litigation provided a legally adequate definition of that phrase.

Finally, the question here, as we have stressed, is in its essence an NLRA § 8(a)(3) question and only derivatively a duty of fair representation question. It makes good sense, we submit, to decide that question in a case coming from the NLRB rather than one coming from a district court.

3. The bulk of Mr. Buzenius' memorandum, at pp. 4-9, is devoted to arguing that the decision below is right. That argument rather remarkably proceeds without ever confronting the statutory language or its legislative history. Beyond that, the points made in the memorandum are anticipated and rebutted at pp. 11-16 of our petition. At this stage, we rest on that showing since the proper place to bring this debate to closure is not in the *certiorari* papers but in the briefs on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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